SUPREME COURT, U. S.

SUPREME COURT OF THE UNITED STATES

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October Term, 1969
No. 655

JOSEPH THOMAS MULLOY,
Petitioner,

-against-

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1969

No.

JOSEPH THOMAS MULLOY,

Petitioner,

-against-

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Petitioner prays that a writ of certiorari issue to review the judgment herein of the United States Court of Appeals for the Sixth Circuit entered in the above-entitled case on June 10, 1969, petition for rehearing denied on August 29, 1969.

OPINION BELOW

The opinion of the Court of Appeals is not yet reported and is printed as Appendix A hereto, p. 1a. It affirmed a judgment of conviction of petitioner for failing to submit to induction into the armed forces of the United States in violation of 50 App. U.S.C. Section 462 (2). Petitioner was tried in the District Court by a jury and there is no opinion

of that Court.

JURISDICTION

The judgment of the United States Court of Appeals was entered on June 10, 1969, Appendix A, p. 1a, petition for rehearing denied on August 29, 1969, Appendix B, p. 12a. Jurisdiction of this Court is invoked under 28 U.S.C. Section 1254 (1).

QUESTIONS PRESENTED

1. Did the Court below err in holding that the petitioner's selective service local board neither abused its discretion in refusing to reopen his classification under 32 C.F.R. Section 1625.4, nor did it reopen his classification in fact within the meaning of 32 C.F.R. Section 1625.2, so as to entitle him to an administrative appeal as provided in 32 C.F.R. Section 1625.13? In so holding did it err further in that it (1) applied the "basis in fact" test applicable to the judicial review of a board's final determination to the review of the board's determination that the petitioner failed to make out a prima facie case for reopening and (2) permitted the board to engage in evaluative consideration of all the information in the petitioner's file under the guise of determining whether the new information submitted by the petitioner, if true, would entitle him to the claimed classification, thereby obliterating any distinction between a refusal to reopen under 32 C.F.R. Section 1625.4 and a denial of the classification on the merits following a reopening under 32 C.F.R. Section 1625.2?

2. Did the Court below err in its conclusion that the petitioner did not make out a prima facie case for classification as a conscientious objector because his objection to serving in the Armed Forces was based on "essentially political, sociological or philosophical views and his conscience rather than on religious training and belief" in that: (1) it failed to recognize that a person whose religious beliefs may cause him to engage in political activity, including resistance to war and military service, is still entitled to classification as a conscientious objector so long as his opposition to participation in war is, in part, based upon religious belief; and (2) even if his opposition to war was based upon non-religious beliefs, he was still entitled to classification as a conscientious objector, because Congress may not, consistent with the First Amendment, limit the conscientious objector exemption to those whose opposition to war is based on religious training and belief?

3. Does the fact that the petitioner was denied the opportunity for full review of his claim for classification as a conscientious objector, including review by an appeals board, when such claim was presented for the first time, constitute a violation of due process of law, as guaranteed by the Fifth Amendment?

4. Was the petitioner denied due process of law, as guaranteed by the Fifth Amendment, in that his claim for classification as a conscientious objector was not given full and fair consideration by his selective service local board, because the members of said board refused to give such consideration to his claim and/or because they lacked the competency and understanding of the applicable statute and regulations to pass intelligently on said claim?

CONSTITUTIONAL PROVISIONS INVOLVED

Amendment I

"Congress shall pass no law respecting the establishment of religion, or prohibiting the free exercise thereof;***"

Amendment V

"No person shall *** be deprived of life, liberty, or property, without due process of law ***."

STATUTE AND REGULATIONS INVOLVED

The statute involved is the Military Selective Service Act of 1967, 50 App. U.S.C. Sections 451 et seq. The relevant provisions are 50 App. U.S.C. Sections 456 (j), 462 (a). Because these provisions are lengthy, their pertinent text is set forth as Appendix C, p. 13a. The regulations involved are Selective Service Regulations, part 1625, 32 C.F.R. Ch. XVI. Because these provisions are lengthy, their pertinent text is set forth as Appendix D, p. 16a.

STATEMENT OF THE CASE

Petitioner was convicted in the United States District Court for the Western District of Kentucky for wilfully refusing to submit to induction into the Armed Forces, in violation of 50 App. U.S.C. Section 462 (a). A sentence of five years' imprisonment and a fine of $10,000 were

imposed. Petitioner had requested classification as a conscientious objector (Class 1-0), and the questions presented for review in this petition arise out of the stated refusal of his selective service local board to reopen his classification of 1-A and to consider on the merits his claim for classification in Class 1-0.

Prior to March 17, 1966, petitioner had been classified in Class 2-S (college student), and from that date until May 11, 1967, he was granted an occupational deferment to work with the Appalachian Volunteers, an anti-poverty organization working in Eastern Kentucky. On May 11, 1967, he was placed in Class 1-A, and he appealed from that classification. He was ordered to report for a physical examination on June 26, 1967, and was found to be physically acceptable. He was then ordered to report for induction on July 17, 1967. This order was cancelled, since his appeal had not yet been determined by the Appeals Board. On August 16, 1967, the Appeals Board classified him in Class 1-A by a vote of 5-0.

Petitioner and others had been engaged in organizing activities among the poor in Eastern Kentucky and in leading the opposition to strip mining that was taking place there. On August 11, 1967, petitioner and others were arrested in Pike County on a charge of "teaching sedition" and "advocating the overthrow of the government of Pike County." The arrest and threatened prosecution were found by a three-judge United States District Court to have been undertaken in part for the purpose of stopping organizing activities in Pike County. The Court also held that the statute in question, Kentucky Revised Statutes 432.040, was unconstitutional on its face, and enjoined any prosecution under it. *McSurely v. Ratliff*, 282 F.Supp. 848 (E.D. Ky. 1967). On September 5, 1967, petitioner advised his local board that he was under

bail to the federal court in connection with the above case (the right of the defendants in that action to appeal did not expire until November 17, 1967) and under bail to the Pike Circuit Court on a charge of flourishing a deadly weapon (that charge was subsequently dismissed). On September 21, 1967, the board issued an order to report for induction, which was cancelled on October 12, 1967.

Following his arrest and the proceedings in federal and state courts, the petitioner's beliefs as to conscientious objection to participation in war came to maturity, and on October 17, 1967, he wrote a letter to the board stating that "after much, much thinking, seeking, and questioning of my own religious upbringing and political experience I have concluded that I am a conscientious objector and I am therefore opposed to war in any form." (Appendix E, p. 30a). He was then sent the Special Form for Conscientious Objectors (SSS Form 150), which he returned on October 26, 1967. He gave detailed answers to the questions on the form, stating among other things that he believed in a Supreme Being and that his religious training taught him that it was "against God's law to kill." He further stated that to be a member of the Armed Forces of any country would oblige him to kill or indirectly assist in killing. (Appendix E, p25a).Various letters supporting his claim were sent to the board, including a letter from a Catholic priest. (Appendix E, p. 35a).

At the time that he submitted the completed form, petitioner also requested in writing a personal appearance before the board. He was advised that although he was not entitled to an interview, the board would grant him a "courtesy interview." This interview took place on November 9, 1967, and lasted between ten and fifteen minutes. (Appendix G, p. 45a). The Chairman of the board stated that "at that time the Board came to the conclusion that there

was no merit to his contention that he was entitled to conscientious objector status." (Appendix F, p. 39a). An entry was made on his Classification Questionnaire on November 9th, stating "Classification was not reopened." (Appendix E, p. 20a). The board, however, did not take a vote at the meeting of November 9th. On November 12, 1967, petitioner wrote a letter to the board setting forth his views more fully. (Appendix E, p. 32a). It was this letter which, according to the Court of Appeals, "indicated rather clearly that his objection to serving in the Armed Forces was based on essentially political, sociological or philosophical views and his conscience rather than on religious training and belief." (Appendix A, p. 8a).

On January 11, 1968, the board formally considered petitioner's claim for classification, and by a vote of 4-0 took the following action as noted in the Classification Questionnaire: "All information in file was considered including claim of Conscientious Objector. All Members present felt this information did not warrant re-opening of 1A class." (Appendix E, p. 20a). On January 21 petitioner wrote to the board, appealing from the board's failure to reclassify him in Class 1-O, stating that he considered his case to have been reopened. The board wrote in reply two days later that it did not consider his case to have been reopened and that he had no right to appeal. On the same date he received an order to report for induction on February 23, 1968.

On February 8, 1968, appellant filed a civil action in the United States District Court for the Western District of Kentucky, seeking to enjoin his induction into the Armed Forces on the ground that the order to report for induction was void, as having been issued in violation of applicable Selective Service Regulations and in such circumstances as to be violative of due process of law. On February 16, 1968, the

Court dismissed his complaint and denied relief. Notice of Appeal to the United States Court of Appeals for the Sixth Circuit was filed on February 16, 1968, together with a motion for an interlocutory injunction pending appeal. The latter motion was denied on February 22, 1968. On February 23, 1968, the petitioner refused to submit to induction into the Armed Forces. The appeal in the civil case was dismissed as moot by the Court of Appeals on May 2, 1968.

The petitioner was indicted by the grand jury on March 11, 1968. He was arraigned on March 18, 1968, at which time he pleaded not guilty and further moved that the indictment be dismissed on the ground, inter alia, that "The Order to Report for Induction, the refusal to obey which forms the basis of said indictment, is illegal, void and of no effect, because it was issued in violation of the applicable statutes and regulations, and further because it was issued in such circumstances so as to deprive the defendant of due process of law." It was stipulated by counsel for the petitioner and counsel for the government that the record of the proceedings in the petitioner's civil suit should form a part of the record in the criminal proceeding. Portions of the record in the civil suit are set forth as Appendix F, p. 39a. On March 22, 1968, the District Court entered an order overruling the petitioner's motion. The Court also stated that it had read the selective service file of the petitioner and the transcript of the hearing in the civil suit, as a result of which it concluded that there was a reasonable basis in fact for the classification of the petitioner and that the actions of the board were proper in all respects.

The case was tried before a jury on April 5, 1968. At the conclusion of the government's case counsel for the petitioner moved for a judgment of acquittal, which was overruled. Counsel for the petitioner then presented his case

and called as witnesses the four members of the petitioner's selective service local board. Portions of their testimony are set forth as Appendix G, p. 41a. Following their examination of said witnesses, counsel moved for a judgment of acquittal on the ground that the testimony of board members showed conclusively that the petitioner had been denied a full and fair hearing and that the demonstrated incompetence of the members of the board in passing on the petitioner's claim for classification as a conscientious objector constituted a denial of due process. This motion was overruled. At the conclusion of the petitioner's case, the motion was renewed together with a written motion for acquittal, filed by petitioner's counsel that day. All said motions were overruled. The jury returned a verdict of guilty, and sentence was imposed on April 8, 1968.

The petitioner appealed his conviction to the United States Court of Appeals for the Sixth Circuit, which affirmed the judgment of the District Court.

REASONS FOR GRANTING THE WRIT

I

In holding that the petitioner's selective service local board neither abused its discretion in refusing to reopen his classification nor did it reopen his classification in fact, United States Court of Appeals for the Sixth Circuit rendered a decision in conflict with the decisions of other Courts of Appeal on the question of when a board abuses its discretion in refusing to reopen and when it has reopened in fact. Further, in conflict with the decisions of other Courts of Appeal on the same question, it applied the "basis in fact"

test applicable to the judicial review of a board's final determination to the review of the board's determination that a registrant failed to make out a prima facie case for reopening, and held that the board was entitled to engage in evaluative consideration of all the information in a registrant's file under the guise of determining whether the new information submitted by the registrant, if true, would entitle him to the claimed classification.

Throughout these proceedings the essential contention of the petitioner has been that in the circumstances of this case either the board was required to reopen his classification or that, in fact, the board did reopen his classification, but denied him the appeal to which he was entitled under 32 C.F.R. Section 1625.13. The Court of Appeals held that the board was not required to reopen his classification because, based upon its consideration of all the information in his file, it could conclude that he had not made out a prima facie case. What the board did, and what the Court of Appeals permitted it to do, was to engage in an *evaluative consideration* of the petitioner's claim, so that it denied the claim on the merits without giving the petitioner the administrative appeal to which he was entitled under Section 1625.13. The board took the position that the petitioner did not make out a prima facie case, but it reached that conclusion only by considering all the information in his file, and evaluating the information favorable to that claim against the information that, in its opinion, did not support it.

The decision of the Court of Appeals, if permitted to stand, completely obliterates any distinction between a refusal to reopen under 32 C.F.R. Section 1625.4 and a denial of the classification on the merits after a reopening under Section 1625.2. Moreover, the holding that the board

neither abused its discretion in refusing to reopen nor did it reopen in fact, is directly in conflict with the decision of the Court of Appeals for the Seventh Circuit in *United States v. Freeman* 388 F. 2d 246 (7th Cir., 1967), and the Court of Appeals for the Ninth Circuit in *Miller v. United States*, 388 F. 2d 973 (9th Cir., 1967).

The answers contained in petitioner's SSS Form 150 clearly make out a prima facie case of opposition to war on the basis of religious training and belief. The form is set out in full, Appendix E, p. 20a. but the following excerpts should indicate that the test of prima facie sufficiency was satisfied. The petitioner stated that he believed in a Supreme Being and that:

> "My religious training taught me that it is against God's law to kill. To be a member of the armed forces of this country or any other would oblige me to either kill or indirectly assist in killing. I also believe that the message of Jesus is love for all mankind. We as his children are to imitate Jesus' love for men." (Appendix E, p. 25a).

> "As a young man I was not taught to be against the use of violence as such. But I was taught not to kill and love all men. This coupled with my adult experience has brought me to my present position. It was only through and after my adult experience that I became a CO." (Appendix E, p. 28a).

The petitioner explained in detail his religious training and experience and stated that he was most influenced by Father Thomas Merton and by the teachings of Jesus Christ. (Appendix E, p. 28a). The board was also in receipt of a letter from a Catholic priest supporting the petitioner's petition and attesting to his sincerity. (Appendix E, p. 35a). The board accepted everything the petitioner said as true and

assumed that he was sincere in his beliefs (Appendix F, p. 39a; Appendix G, pp. 49a, 50a). Notwithstanding the board took the position that the petitioner "still did not make out a case for conscientious objection, and therefore, we saw no reason to reopen the case, because it wasn't there." (Appendix F, p. 39a).

In the view of the Court of Appeals the refusal of the board to reopen the classification in these circumstances did not constitute an abuse of discretion. This is in direct conflict with the holding of the Court of Appeals for the Seventh Circuit in *United States v. Freeman*, 388 F.2d 246 (7th Cir., 1967). In that case the defendant gave rather sketchy answers to the questions contained in SSS Form 150. However, he did state that he believed in a Supreme Being, that he was a member of the Islam religion, and that by reason of his religious beliefs he was opposed to participation in war in any form. There was nothing more, and according to Judge Koch, dissenting, "Most of this data comes from statements appearing in the printed form which were adopted by the defendant by check mark or signature." 388 F.2d at 250. The Court held that what he had stated was sufficient to make out a prima facie case for classification as a conscientious objector, "since he presented new information in his SSS Form 150 which, if true, entitled him to reclassification." The conviction, therefore, was reversed. If it was an abuse of discretion for the board to refuse to reopen in that case, it was clearly an abuse of discretion for the board to reopen in the case at bar in view of the information that the present petitioner furnished in response to the questions contained in SSS Form 150. The petitioner set forth new facts which, if true, entitled him to the claimed classification, and these new facts were accepted as true by the board. The decision of the Court of Appeals for the Seventh Circuit in

Freeman and the decision of the Court of Appeals for the Sixth Circuit in the case at bar set forth very different tests for determining when a registrant seeking classification as a conscientious objector has made out a prima facie case for reopening. This Court should grant certiorari to resolve the conflict.

In refusing to reopen the petitioner's classification, the board took the position that the petitioner was seeking an occupational deferment rather than classification as a conscientious objector. (Appendix F, p. 39a). The Court of Appeals noted this fact and further observed that the petitioner's objection to serving in the Armed Forces was "based on essentially political, sociological views and his conscience rather than on religious training and belief." This was said to have been "rather clearly indicated" from the letter of November 12, 1967, which he sent to the board. (Appendix E, p. 32a). The Court of Appeals also stated that there was evidence in the file from which the board could have concluded that the petitioner was not sincere in his beliefs, particularly since he had made "inconsistent statements" and there were facts which "cast doubt upon his veracity." This completely ignores the fact that his board assumed that everything the petitioner said was true and that he was sincere in his beliefs. (Appendix F, p. 39a; Appendix G, pp. 49a, 50a).

It was never denied by the Court of Appeals that the petitioner presented at least some facts - at a minimum his answers to the SSS Form 150 and the supporting letters - which, if true, would have entitled him to be classified as a conscientious objector. The conclusion that the petitioner really wanted an occupational deferment - the board's position - or that his opposition to war was not based on religious training and belief - the Court's position - could be

reached only by the evaluation of all other information in his file. Such an evaluation constitutes a determination of the claim on the merits, a weighing of seemingly contradictory information .and the drawing of inferences from such information. When a board has engaged in this kind of determination, it cannot be heard to say that "the new facts, if true, would not justify a change in the registrant's classification" within the meaning of 32 C.F.R. Section 1625.4. What the board has done is to conclude that the new facts, when considered in light of other facts and evaluated against those facts, would not justify a change in the registrant's classification. By so doing, it has reopened the classification, and the registrant is entitled to an administrative appeal, as provided in 32 C.F.R. Section 1625.13.

In the case at bar, however, the Court of Appeals, held that the board could engage in such evaluative consideration, based upon all the information in the petitioner's file (as opposed to the new information submitted by the petitioner in support of his claim for reclassification), without thereby reopening the classification so as to entitle the registrant to an administrative appeal. That holding is directly in conflict with the holding of the Court of Appeals for the Ninth Circuit in *Miller v. United States*, 388 F.2d 973 (9th Cir., 1967). In that case the appellant had been classified I-A and had passed his pre-induction physical. Less than a month later he wrote a letter to the board claiming to have become a conscientious objector. He completed the SSS Form 150, and after an improper order to report for induction had been cancelled, the board proceeded to consider his request for a reopening of his classifica on. The board refused to reopen on the ground that "the information submitted did not warrant reopening of the classification." It noted that he had previously applied for enlistment in a reserve program, for

which he had not been accepted, and as a result it was "the opinion of the board that the registrant was seeking to avoid induction." In reversing the conviction for refusal to submit to induction, the Court stated:

> "It cannot be held that the statements and information in appellant's letter and executed form No. 150, if true, would not be able to provide basis for a conscientious objector classification and so could not justify a consideration of the question of change in his classification. . . . what the board actually did, as the implications of its minutes reflect, was to engage in evaluative consideration and judgment that, regardless of the prima facie sufficiency of the information submitted, it was not, when probatively weighed against other elements in the situation, entitled to credence in fact. . . .
>
> [T]he local board did not deal with the alleged facts or evidence of appellant's conscientious objector form as a question of whether this legally could provide basis for a reopening to be made, so as to entitle consideration and evaluation to be engaged in thereafter under the general classification procedure of the regulations. It shortcut the consideration of whether appellant was entitled to a conscientious objector classification on the merits of the probative elements of its file. It weighed the information contained in the appellant's form against other probative factors (such as his attempted reserve enlistment during the month preceding) and arrived at the judgment that he was not in truth a conscientious objector but was merely seeking to avoid induction." 388 F.2d at 973, 976.

In the case at bar the board weighed the information contained in petitioner's SSS Form 150 and in the supporting

letters he submitted against other probative factors based on the information contained in his entire file, principally his previous claim for an occupational deferment, and concluded that he was not "in truth a conscientious objector but an anti-poverty worker seeking to avoid induction under the guise of being a conscientious objector." The Court of Appeals sanctioned such evaluative consideration and engaged in it on its own by weighing the information contained in the SSS Form 150 and supporting letters against other information, concluding that the petitioner's opposition to war was not based on religious training and belief, as he contended, but upon "essentially political, sociological or philosophical views and his conscience." And it did so despite the fact that the action of the board must be supported on the grounds which the board gave for such action. *Gatchell v. United States* 378 F.2d 287 (9th Cir., 1967).

Its decision is in direct conflict with the decision of the Court of Appeals for the Ninth Circuit in *Miller v. United States, supra.* It is likewise in conflict with the decision of the Court of Appeals for the Fifth Circuit in *Robertson v. United States,* 404 F.2d 1141 (5th Cir., 1968). There the registrant, who had previously been denied a ministerial exemption, presented evidence that he was working 100 hours per month as a "Vacation Pioneer" and that his sect considered some Vacation Pioneers to be regular ministers. The Court held that the evidence presented was sufficient to make out a prima facie case, and that "the regulations do not permit the board to evaluate a request for classification on its merits until it first determines whether the information submitted by the registrant requires reopening." The action of the board in that case was improper, because "it considered whether or not he should be reclassified, and having decided that he should not be, refused to reopen his classification."

In the case at bar the Court of Appeals did not review the information supplied by the petitioner, which the board accepted as true, and determine whether that information required a reopening. Instead it allowed the board to evaluate the petitioner's request on the merits and then to refuse to reopen the classification, thereby depriving him of his right to appeal.

The approach of the Court of Appeals for the Sixth Circuit to judicial review of a board's refusal to reopen a classification differs from the approach taken by other Courts of Appeal in two very important respects, and this difference, it is submitted, results in the Court's (1) holding that the board has not abused its discretion in refusing to reopen in circumstances in which other Courts of Appeal find an abuse of discretion, and (2) allowing the board to engage in evaluative consideration on the merits under the guise of finding that the registrant did not make out a prima facie case for reopening. The Court of Appeals for the Sixth Circuit appears to be applying the same "basis in fact" test applicable to to judicial review of a board's final determination to the review of a board's determination that a registrant failed to make out a prima facie case. It was of the opinion that "there was a rational basis for the board's determination that Mulloy had not established a case of conscientious objection." In arriving at that conclusion it looked to all the information contained in the petitioner's file and singled out certain information that in its opinion showed that his beliefs were "political, sociological and philosophical rather than religious" and certain information showing that the board could find he was not "sincere" (ignoring the fact that the board assumed he *was* sincere in his beliefs). This is the approach that may properly be taken to judicial review of a merits determination under the "basis in fact test," *Witmer v.*

United States, 348 U.S. 375 (1955), but it is totally inappropriate to judicial review of a board's refusal to reopen.

The distinction between the scope of review of a board's final determination and review of a board's refusal to reopen was discussed at length by the Court of Appeals for the Ninth Circuit in *Petrie v. United States*, 407 F.2d 267, 274-5 (9th Cir., 1969), where the Court observed:

> "As applied to an action of the local board in refusing to reopen a classification pursuant to a registrant's request, the basis in fact test is substantially different in degree from that applied to the board's final classification decision. As to the latter action, basis in fact consists of 'some proof' - something which may be less than substantial evidence - to support the *evaluative classification decision*...In comparison, the Regulations governing reopening...have been construed to require only that the registrant present to his local board a 'prima facie case' supporting his request for placement in another classification...Thus, 'refusal to reopen has no basis in fact if the written request to reopen sets forth a prima facie case for reclassification and if it contains some allegations of fact in addition to those considered when the registrant was originally classified..."

The Court also approved the explanation of the prima facie case test set forth in *United States v. Longworth*, 269 F.Supp. 971, 974 (S.D. Ohio 1967), to the effect that, "the board is mandated into at least looking at the facts as stated, considering whether it has previously known those facts when its prior classification was made and considering whether the facts stated, if true would to *any* reasonable mind, justify a reclassification." And in *Howze v. United States*, 409 F.2d 27, (9th Cir., 1969), the Court posed the

test in terms of whether the board *would have* a basis in fact to grant the requested classification on the basis of the information that the registrant submitted.

It is clear that the Court of Appeals for the Sixth Circuit is applying a very different standard for judicial review of a board's refusal to reopen from that being applied by the Ninth Circuit. Since the Sixth Circuit's standard is the same one that it applies to review of a final determination, it is very likely, as in the case at bar, to uphold a refusal to reopen in circumstances where the Ninth Circuit would find that the refusal to reopen would constitute an abuse of discretion. The decisions of the Ninth Circuit in *Petrie v. United States, supra,* and *Howze v. United States, supra,* as contrasted with the decision of the Sixth Circuit in the case at bar, demonstrate this difference, as does the decision of the Seventh Circuit in *United States v. Freeman, supra.*

The Court of Appeals for the Sixth Circuit also stands alone in its holding that in determining whether the registrant has made out a prima facie case for reopening the board can consider and evaluate all the information in the registrant's file against the new evidence which he has submitted in support of his claim. This is contrary to the express language of Section 1625.4, which says that the board shall not reopen if it is of the opinion that the *new facts,* even if true, would not justify a change in the registrant's classification. If the board is to consider all the information in the registrant's file, including that previously considered with respect to a claim for another classification, it is necessarily determining the claim on the merits rather than determining whether the registrant made out a prima facie case. All other courts passing on the question have looked only to the evidence submitted by the registrant in support of his claim in order to determine whether he has made out a prima facie case for

reopening. If that evidence is sufficient to make out a prima facie case, the board is required to reopen, *and at that time it evaluates the information submitted against other information in the file*. If it denies the claimed classification on the merits, the registrant is entitled to an administrative appeal, which is denied to him if the board refuses to reopen. See *Robertson v. United States*, 404 F. 2d 1141-7 (5th Cir., 1968); *Davis v. United States*, 410 F. 2d 89, 93-95 (8th Cir., 1967); *United States v. Freeman*, 388 F. 2d 246, 249 (7th Cir., 1967); *Howze v. United States*, 409 F. 2d 27, 28 (9th Cir., 1969). The facts in *Davis v. United States, supra*, were very similar to the facts in the case at bar, and there the Court observed:

> "Davis' statements, taken from his Selective Service Form 150..., if taken as true, demonstrate that he is conscientiously opposed to participation in war in any form and that his objection is based on religious training and belief. Accompanying his conscientious objector Form 150 was a letter from his pastor...
>
> These statements, if accepted at face value, constitute a prima facie case for the conscientious objector classification as specified in 50 U.S.C. App. Section 456 (j). The local board was therefore required to reopen his classification. 32 C.F.R. Section 1625.2. . . ." 410 F. 2d at 94-5.

And, as observed in *United States v. Freeman, supra*, "In our opinion the Local Board was compelled to reopen Freeman's classification in 1962 and extend to him all the rights provided in the regulations since he presented new information in his 1962 SSS Form 150 which, if true, entitled him to reclassification." 388 F. 2d at 249.

In the case at bar the Court stated that the board had the power to investigate and determine whether the facts stated in support of the application for reclassification were true and that this justified a consideration of all the information in the file. *But the board accepted as true everything that the petitioner stated.* (Appendix G, p. 50a). This being so, consideration of all the information in the file could not even be justified on this ground.

This Court should grant certiorari to resolve the conflict between the decision of the United States Court of Appeals for the Sixth Circuit in the case at bar and the decisions of other Courts of Appeal on the question of when a board abuses its discretion by refusing to reopen a classification on the ground that the registrant has not made out a prima facie case and when a board has, in fact, reopened by engaging in evaluative consideration. So too, it should grant certiorari to resolve the conflict between the decision of the United States Court of Appeals for the Sixth Circuit in the case at bar and the decisions of other Courts of Appeal with respect to the test proper for judicial review of a board's determination that a registrant has not made out a prima facie case for reopening and with respect to whether in passing upon such a request, the board is limited to a consideration of the new information furnished by the registrant, which it accepts as true, or whether it may engage in evaluative consideration of all the evidence in his file.

II

Certiorari should be granted to review the holding of the Court below to the effect that the petitioner failed to make out a prima facie case for classification as a conscientious objector because his opposition to serving in the Armed Forces was based on "essentially political, sociological or philosophical views and his conscience rather than religious training and belief," since in so holding, the Court failed to recognize that a person whose religious beliefs may cause him to engage in political activity, including resistance to war and military service, is still entitled to classification as a conscientious objector so long as his opposition to war is, in part, based upon religious belief.

In *Sicurella v. United States*, 348 U.S. 385, 391 (1955), this Court observed:

> "The Court of Appeals also rested its decision on the conclusion that petitioner's objection to participation in war was only a facet of his real objection to all governmental authority. We believe, however, that if the requisite objection to participation in war exists, it makes no difference that a registrant also claims, on religious grounds, other exemptions which are not covered by the Act. *Once he comes within Section 6 (j), he does not forfeit its coverage because of his other beliefs which may extend beyond the exemption granted by Congress.*" (emphasis added)

Granted that Congress has not chosen to exempt those whose opposition to war is based upon "political, sociological or philosophical views or a merely personal moral code," if one's opposition to war is based in part on religious training and belief, he is entitled to classification as a conscientious

objector, although his opposition may be based on other kinds of beliefs, *i.e.*, political, sociological and philosophical, as well.

The present petitioner stated in the answers to SSS Form 150 that his opposition to war was based on religious training and belief and explained how he arrived at that position. (Appendix E, pp. 25a-28a). A letter from a Catholic priest explained how opposition to participation in war was consistent with the teachings of the Catholic Church. (Appendix E, p. 35a). However, the petitioner is not a quiet pacifist. To him his religious beliefs meant becoming involved in political action, particularly working among the poor in the mountains of Eastern Kentucky. They meant working against the coal operators and strip-miners and organizing the poor for political power. To the petitioner this was directly related to his religious beliefs. As he stated in his answers to the SSS Form 150:

> "As I grew and participated in the world I was able to determine a priority on the things I learned as a child. Thus I place love of my fellow man above regular church attendance. And I place Thou Shalt Not Kill above An Eye for an Eye. I learned rapidly in my work in the southern Highlands the significance of life and understanding and the futility of violence and force. Too many poor people have been used and walked on by the power hungry courthouse gangs. There is an urgent need for the poor to become organized and the rich to be educated. This must be done in a non-violent way. Violence only breeds violence." (Appendix E, pp. 27a-28a).

As a result of his activities in Eastern Kentucky, the petitioner and others were arrested and indicted on a charge of "teaching sedition" and "advocating the overthrow of the

government of Pike County." A three-judge United States District Court found that the prosecution was undertaken at least in part for the purpose of stopping organizing activities in Pike County and enjoined the prosecution under a statute which it found to be unconstitutional on its face. *McSurely v. Ratliff*, 282 F.Supp. 848 (E.D.Ky. 1967).

The petitioner's beliefs also caused him to work against the war. As he stated in his SSS Form 150 in response to the question, "Describe the actions and behavior in your life which in your opinion most conspicuously demonstrate the consistency and depth of your religious convictions:"

> "I have supported peace demonstrations to end the war in Vietnam. I have written letters to my Senators and signed a petition to President Johnson urging a negotiated peace in Vietnam." (Appendix E, p. 28a).

Following his "courtesy interview" with the board, he wrote a letter saying that he expected that the board would draft him "regardless of my feelings." At that time he stated that he had not made up his mind what course he would follow. He then stated:

> "If I decided to go into the Army I will, of course, do everything in my power to teach my fellow soldiers the truth about Vietnam and Non-violent principles. I will actively organize resistance. If I choose not to go into the Army I will resist induction and make the biggest stink about it possible. I must do this to bear witness to my beliefs and to cause my fellow citizens to think..." (Appendix E, p. 33a).

According to the Court below, this letter "indicated rather clearly that his objection to serving in the Armed Forces was based on essentially political, sociological or philosophical views and his conscience rather than on religious training and belief." (Appendix A, p. 8a).

By so holding the Court failed to recognize that a person whose religious beliefs may cause him to engage in political activity, including resistance to war and military service, is still entitled to classification as a conscientious objector so long as his opposition to war is, in part, based upon religious training and belief. The Court focused on the petitioner's political activity and ignored his statements of religious belief and the letters submitted in support of its claim. In so doing, it disregarded the test set forth by this Court in *Sicurella v. United States, supra.*

There is the real danger that the Court below may appear to be saying something else, namely that once a registrant engages in "political activity," particularly opposition to the war and the draft, he forfeits the claim that his beliefs are "religious." The "religious conscientious objector" then is defined as a person who does not "resist the system," but "quietly holds to his views." But the person whose religious beliefs cause him to actively resist war and conscription will be found to be a "political" rather than a "religious" conscientious objector.

The decision of the Court below with respect to the "essentially political, sociological or philosophical" opposition to war on the part of the present petitioner is in direct conflict with the decision of the United States Court of Appeals for the Tenth Circuit in *Fleming v. United States,* 344 F.2d 912 (10th Cir., 1965). There the Court held that although the registrant might have been influenced more by sociological and philosophical views rather than by religious beliefs, since he had been influenced in part by religious training and belief, he was entitled to classification as a conscientious objector. The Court stated:

> "As we read the Seeger case, it clearly lays down the rule that before a conscientious objector classification

> may be denied on the ground that the applicant's beliefs are based upon 'political, sociological, or philosophical views or a merely personal moral code,' those factors must be the *sole* basis of his claim for the classification...
>
> The entire record clearly shows that his beliefs are, in part at least, based upon religious convictions. It may be true that appellant has been influenced, in the words of the hearing examiner "*** more by sociological and philosophical views than by religious beliefs or the dictates of a deity.' But it is also clear that he has been influenced by religious training and belief. Therefore, Fleming comes clearly within the definition of a "conscientious objector..." 344 F.2d at 916.

The record in the case at bar also clearly shows that the present petitioner has been influenced, at least in part, by his religious training and belief. He so stated in his answers to the SSS Form 150, and the board accepted everything he said as true and found that he was sincere in his beliefs.

Certiorari should be granted because the decision of the Court of Appeals for the Sixth Circuit on the question of "religious" versus "political, sociological or philosophical" belief is in conflict with applicable decisions of this Court and in conflict with the decision of the Court of Appeals for the Tenth Circuit in *Fleming v. United States, supra.*

III

The holding of the Court below that the petitioner could be denied classification as a conscientious objector because his opposition to war was not based upon religious training

and belief assumes that Congress may, consistent with the First Amendment,' limit the conscientious objector exemption to those whose opposition to war is based upon religious training and belief. Certiorari should be granted, because this raises the same question as is raised in United States v. Sisson, which is currently before this Court.

Petitioner has maintained throughout these proceedings that his opposition to war was based upon conventional religious training and belief, namely the teachings of the Catholic Church and Jesus Christ. The Court below, quoting from petitioner's letter to his board of November 12, has taken the position that his objection to serving in the Armed Forces was based upon "essentially political, sociological or philosophical views and his conscience rather than on religious training and belief." (Appendix A, p. 8a). It was never suggested by the board, the government or the Court that the petitioner was not opposed, politically, philosophically, as a matter of conscience or otherwise, to participation in war. Therefore, if it is concluded that the petitioner did not make out a prima facie case of conscientious objection on the basis of religious training and belief, it cannot be denied, particularly in view of the great weight that the Court attached to his letter of November 12, that he *did* make out a prima facie case of conscientious objection on the basis of "political, sociological or philosophical views and his conscience."

In *United States v. Sisson*, 297 F.Supp. 902 (D.Mass. 1969), it was held that 50 U.S.C. App. Section 456 (j) was unconstitutional on the ground, *inter alia*, that it limited the conscientious objector exemption to those who were opposed to participation in war by virtue of religious training and belief, in violation of the provision of the First Amendment that "Congress shall make no law respecting the

establishment of religion or prohibiting the free exercise thereof." A direct appeal was taken to this Court pursuant to the provisions of 18 U.S.C. Section 3731. If it is unconstitutional to limit the exemption to those whose opposition is based upon religious training and belief, the constitutional rights of the present petitioner have likewise been abridged, since it is not disputed that he was conscientiously opposed to participation in war, although the Court found that this objection was not based upon religious training and belief.

In view of the Court's holding as to the nature of the petitioner's beliefs, this argument was expressly presented in the petition for rehearing, which was rejected. This Court should grant certiorari, because the case at bar raises the same issue as is raised in *United States v. Sisson.*

IV

This Court should grant certiorari to settle the question of whether the denial of the opportunity for full review of a claim for classification as a conscientious objector, including review by an appeals board, when such claim has been presented for the first time, constitutes a violation of due process of law, as guaranteed by the Fifth Amendment.

Whenever a board summarily dismisses under 32 C.F.R. Section 1625.4 a claim that has been made for the first time, the registrant will never have had his claim reviewed by an appeals board. At the same time registrants whose claim was made at the time of the original classification or whose classification was reopened and their claim denied on the merits do have the right of appeal. However, all three

registrants have presented their claims for the new classification, here conscientious objector status, for the first time after the facts entitling them to such status have matured. To allow two of them to appeal while denying the right of appeal to the third, it is submitted, constitutes impermissible discrimination, "so unjustifiable as to be a denial of due process." *Bolling v. Sharpe*, 347 U.S. 497 (1954); *Schneider v. Rusk*, 377 U.S. 163 (1964).

It is not contended that due process requires that there be an appeal from the board's refusal to reopen the classification in all cases. *United States v. Beaver*, 309 F.2d 273 (4th Cir., 1962), *cert. denied*, 371 U.S. 951 (1963); *Klubnikian v. United States*, 227 F.2d 87 (9th Cir., 1955), *cert. denied*, 350 U.S. 975 (1956). What is contended is that where a claim for a particular status has been made for the first time, and that claim is not on its face "clearly frivolous," the registrant must be permitted to appeal from the board's refusal to recognize that claim. The right to appeal cannot be the subject of invidious discrimination. *Griffin v. Illinois*, 351 U.S. 12 (1956); *Douglas v. California*, 372 U.S. 353 (1963). This should be equally true of administrative appeals. Since registrants whose claim was made at the time of their original classification have the right to appeal, as do registrants whose classification was reopened and the claim denied on the merits, the right to appeal cannot be denied to a registrant who has likewise presented a claim for the first time. This is what occurs where the board refuses to reopen on the ground that the registrant has not made out a prima facie case - particularly, where as here, the board is permitted to engage in evaluative consideration of the registrant's entire file in order to determine whether he has made out a prima facie case.

Directly in conflict with the decision of the Court below

on this issue (the Court below disposed of the issue by saying that "other claims of error are insufficient to warrant reversal") is the decision of the Court of Appeals for the Ninth Circuit in *Miller v. United States*, 388 F.2d 973 (9th Cir., 1967). In holding that a local board could not cut off a registrant's appeal rights by refusing to reopen under Section 1625.4 when it had, in fact, "engaged in a general consideration and evaluation of the claim," the Court first observed that such action "could not be harmonized with the provisions and purposes of Sections 1625.2 and 1625.11." It went on to hold that if such power existed, the action of the board would be discriminatory and violative of due process. The Court stated:

> "But if such an implied power can be regarded as being intended to exist under the regulations, then it must be held, we think, that the discrimination which the board effects against a conscientious objector claimant by dealing with his situation on this basis, as opposed to another such claimant of similar prima facie situation to whom it accords a reopening, would be a violation of the due process clause of the Fifth Amendment.
>
> In the latter situation, a conscientious objector claimant would be left with the procedural rights to appear, be heard, and take an appeal, while in the first situation there would be a foreclosure of these substantial incidents to a similar claimant. For a local board to be able to effect a discrimination of such substance between prima facie situations of legal equality would seem to us to constitute a matter of basic unfairness and hence to be, in the language of *Bolling v. Sharpe* and *Schneider v. Rusk*, 'so unjustifiable as to be violative of due process'."

(citations omitted) 388 F.2d at 976-977.

This Court should grant certiorari to resolve this important question of procedural due process and to resolve the conflict between the decision of the Ninth Circuit in *Miller* and the decision of the Sixth Circuit in the case at bar.

V

This Court should grant certiorari to consider whether the due process requirement of a full and fair hearing necessitates that a selective service local board in passing on a claim for classification as a conscientious objector read the registrant's file with some degree of care, particularly his SSS Form 150, and further that it possess a minimum understanding of the applicable statute and regulations in order to pass intelligently on said claim.

Administrative due process includes the right to a full and fair hearing. *Morgan v. United States*, 289 U.S. 468 (1936). This applies with equal force to a hearing by a selective service local board. *Bejelis v. United States*, 206 F.2d 354 (6th Cir., 1953). It is the contention of the petitioner that he was denied a full and fair hearing by his local board in that (1) it did not give proper consideration to his claim by reading his file with some degree of care, at least his SSS Form 150, and (2) the members of the board lacked the competency and understanding of the applicable statute and regulations to pass intelligently on his claim.

It seems agreed that the petitioner's "courtesy interview" with his local board on November 9, 1967, lasted about ten or fifteen minutes. (Appendix G, p. 45a). What stands out from the record is that petitioner's file, particularly his SSS

Form 150, was not carefully examined by any member prior to the meeting. In answer to the question, "Prior to the meeting did you read his Selective Service file," board member Downes stated: "I scanned it because I am the newest member on this particular board and I was not familiar with what was in his file at all." (Appendix G, p. 43a). He also did not remember whether he had looked at the petitioner's SSS Form 150. (Appendix G, p. 43a). Board member Downes also testified that "the only time that I would have had an occasion to even consider the file would have been during one of the Board meetings or before the meeting started." (Appendix G, p. 47a). Board member Wolking testified that he read the file, but that he did not specifically recall having gone through it nor did he recall how much time he spent on it. (Appendix G, p. 46a, 47a). Board member Rickert, who was not present at the November 9th meeting, but who did vote at the January 11th one, at first testified that he had not read the petitioner's responses to SSS Form 150. (Appendix G, p. 51a). He then said that he looked at the file before the meeting of January 11th. (Appendix G, p. 52a). Board chairman Sherman testified that "the board members looked over his file before he came in as we do anybody else." (Appendix G, p. 54a).

It is clear that no board member went through the petitioner's file thoroughly, reading and analyzing the detailed answers he gave to the questions contained in SSS Form 150. The file was "scanned" prior to the time he came in. The interview lasted about ten or fifteen minutes. No questions were directed to the contents of SSS Form 150; in fact, board members did not recall asking any questions at all. (Appendix G, p. 48a). It is submitted that the above clearly demonstrates that the board did not give full and fair consideration to the petitioner's claim. In *Zenith*

International Film Corp. v. City of Chicago, 291 F.2d 785 (7th Cir., 1961), the Court held that the owner of a film declared to be obscene had been deprived of a full and fair hearing because administrative officials had failed to view a film in its entirety before declaring it to be obscene. So too, a local board should be required to carefully read a registrant's selective service file, or at least his detailed answers to SSS Form 150, before concluding that "the new facts even if true, did not make out a prima facie case for entitlement to classification as a conscientious objector." Perhaps the board was "too busy" to consider his file carefully, but matters of due process cannot be compromised "on the footing of convenience or expediency." *Ohio Bell Telephone Co. v. Public Utilities Commission of Ohio*, 301 U.S. 292, 305 (1937).

It has been observed that in regard to the draft law, "probably no provisions have been examined more closely than those relating to the deferment of conscientious objectors." *United States v. Gearey*, 368 F.2d 145, 146 (2nd Cir., 1966). And yet it is doubtful whether the members of the petitioner's board had any more than the vaguest understanding of the applicable statute and regulations in regard to that classification. This is not surprising, since the clerk of the board testified that in her seventeen years with the Board *no registrant had ever been assigned to civilian work as a conscientious objector.* (Appendix G, p. 42a). The testimony of the board members concerning their understanding of the applicable statute and regulations is most revealing. In response to the question of whether he was "thoroughly familiar with the regulations governing classification of conscientious objectors," board member Downes testified:

> "I can't say that I'm thoroughly familiar. As I indicated to you before, I am perhaps the youngest

person on the particular board, (Appendix G, p. 43a). He then stated that he had an understanding of "what a conscientious objector is" in a general sense. This was:

> "Well, it is my understanding that if a person declares that he is a conscientious objector that rather than going into the military he could serve in some other capacity."

If a registrant could obtain conscientious objector status simply by "saying" that he is one, the present petitioner would not now be under a sentence of five years' imprisonment. The dialogue continued:

> Q: Well, the draft Board has to make that decision, doesn't it? He can't just do it on his own.
>
> A: The draft Board, I thought now, was involved primarily with determining the availability of people." (Appendix G, p. 45a).

Board member Wolking did not know what classification was to be given to conscientious objectors. He also seemed to think that by signing SSS Form 150 the petitioner stated that he would *not* perform civilian service in the national interest. (Appendix G, p. 49a). Board Chairman Sherman, an attorney, was completely confused regarding the distinction between classification in Class 1-O and classification in Class 1-A-O. He did not know if the board could classify a person as qualified for noncombatant service only, and thought that if the board found that the petitioner was a conscientious objector, he would be classified in Class 1-A-O. (Appendix G, p. 54a. His understanding of a conscientious objector was "one who has conscientious scruples against taking another person's life even under any circumstances." (Appendix G, p. 53a). This, of course, is not the definition given in the statute, which is based upon opposition to participation in *war* in any form, and one who would take human life in

self defense may still be classified as a conscientious objector. *Taffs v. United States*, 208 F. 2d 329 (8th Cir., 1953), *cert. denied*, 347 U.S. 928 (1954).

The foregoing makes it abundantly clear that the board members had little or no understanding of the law governing the petitioner's claim for conscientious objector status. Administrative agencies, including selective service local boards, are deemed to have "expertise" in the law they are administering. The petitioner's local board not only lacked such "expertise" when it came to determining a question of conscientious objection, but clearly demonstrated administrative incompetence.

The question of whether due process is denied when a local board, lacking basic competency and understanding of the applicable statute and regulations, passes on a claim for classification as a conscientious objector has not been decided by this Court. Nor has it been definitely established by decisions of this Court that the members of a local board are required to read and analyze a registrant's file, particularly his SSS Form 150, with some degree of thoroughness before holding that he did not make out a prima facie case for reopening. Both questions are presented in the case at bar, and this Court should grant certiorari to resolve them.

CONCLUSION

For the reasons aforesaid, it is respectfully prayed that a writ of certiorari be granted to review the judgment of the United States Court of Appeals for the Sixth Circuit.

Respectfully submitted,

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APPENDIX A
Opinion of the United States Court of Appeals for the Sixth District

FILED
JUN 10 1969
CARL W. REUSS, Clerk

No. 18709

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff-Appellee,
v.
JOSEPH THOMAS MULLOY,
Defendant-Appellant.

APPEAL from United State District Court for the Western District of Kentucky.

Decided June 10, 1969.

Before: WEICK, Chief Judge, CELEBREZZE and McCREE, Circuit Judges.

WEICK, Chief Judge. Appellant Mulloy was convicted in the United States District Court of wilfully refusing to submit to induction into the Armed Forces, in violation of Military Selective Service Act of 1967. 50 U.S.C. App. § 462(a). A sentence of five years' imprisonment and a fine of $10,000 were imposed.

Appellant contends that the grand jury and the petit jury were improperly constituted; that the Universal Training Service Act as amended in 1967 is unconstitutional; and that the Vietnam war is illegal. These same contentions were made in *United States* v. *Pratt*, — F.2d — (No. 18,710, 6th Cir. 1969), which case was consolidated for argument with this one. For the reasons and upon the authority relied upon in *Pratt*, we reject these contentions.

Appellant further contends that his procedural rights were violated by the refusal of his Local Board to reopen his classification of 1-A (available for military service) which

was granted to him by the Appeal Board. He asserts that this was arbitrary and unreasonable and constituted an abuse of discretion; and that it deprived him of a second administrative appeal and violated his constitutional rights.

Mulloy registered for the draft on June 13, 1962. He filed his Classification Questionnaire (SSS Form 100) on June 17, 1963. He did not at that time request an exemption as a conscientious objector. On November 22, 1963 his Local Board classified him 2-S (college student), which classification remained for four years. After leaving college he was employed by the Appalachian Volunteers, operated by the Office of Economic Opportunity, and was granted a one-year occupational deferment by the Board. Upon expiration of this deferment, he requested another occupational deferment so that he could continue his work with the Volunteers, but the Board on May 17, 1967, in accordance with its policy in such cases to limit deferment to one year, denied his request and classified him 1-A.

On May 17, 1967 Mulloy was ordered to report for a physical examination. On May 19th he wrote a letter appealing to the Board to review and reconsider his request for an occupational deferment. On June 26th he was found qualified at the Armed Forces Examining Station and was notified of his acceptability by Statement of Acceptability (DD Form 62). The Board wrote Mulloy on July 3, 1967, asking whether he wanted it —"

> ". . . . to first review your file and then forward it to the Appeal Board or simply forward to the Appeal Board only . . . ."

He replied that he —

> ". . . appealed the classification on the grounds of occupation and asked for a renewal of my 2-A deferment. . . . Please do what is necessary to reconsider my classification."

On July 17, 1967 the Board issued an order to Mulloy to report for induction. He then requested that his appeal be forwarded to the Board of Appeal and also asked for a personal appearance. The Board denied his request for personal appearance because the request had not been made within thirty days after classification, as required by the regulation (32 C.F.R. § 1624.1(a)). Although his right to appeal had expired, and because of an apparent misunderstanding, the Board forwarded his file to the Appeal Board and cancelled the order to report for induction. On August 16, 1967 the Appeal Board classified him in 1-A by a 5-0 vote.

On September 5, 1967, the Board received a letter from Mulloy advising that he was under arrest and out on bail, charged with sedition for teaching and advocating the violent and forceful overthrow of the United States Government and the State of Kentucky. On September 21, 1967 the Board issued an order to report for induction on October 16, 1967. This was the second induction order. On October 9th the Board received another letter from him advising that he was still under a $5,000-bond in the U.S. 6th District Court and also under a $500-bond to the Pike County Court "on the charge of flourishing a deadly weapon. I request that you cancel that induction order . . . ."

On October 12, 1967 the Board cancelled the second order to report for induction and advised Mulloy by letter of its action. On the day after he was scheduled to report for induction under the cancelled order, he wrote to the Board asking for "A Conscientious Objector Application Form", which was supplied to him. He returned it to the Board with attachment thereto on October 30, 1967. In his letter enclosing the form he stated that his lawyer advised that he was still under bond to the Federal Court in Lexington and "I request a personal interview with my Board to discuss my appalachian."

The Board replied by letter advising him that his appeal rights and personal appearance time had both expired but that

it was granting him a personal appearance through courtesy. 32 C.F.R. § 1625.1(c).

Mulloy appeared at the meeting. The Board received and placed in his file a number of letters in support of his request. The Clerk of the Board prepared a resume of his appearance and placed it in his file. The resume indicates that the Clerk was instructed to write to the Federal Court in Lexington to inquire concerning his appeal and bond. The resume further stated:

> "Until such time as a reply is received, the members would not consider him a C.O."

An entry was made on his Classification Questionnaire on November 9th, stating "Classification was not reopened."

On November 17, 1967, the Board received a letter from Mulloy in which, among other things, he stated:

> "This brings us to the war in Vietnam and my draft situation. I do not question individual integrety [sic] or your right by law to do what you do. I do however believe that every citizen has the duty of dissent, even resistance, regarding acts which violate his conscience
>
> . . . .
>
> "Since I believe my country's course to be wrong in Vietnam, I feel that I would be serving my country's best interests, now and in the future generations, to follow my conscience.
>
> "I feel that you are going to try to draft me anyway, regardless of my feelings. *I have not made up my mind as yet.* If I decided to go into the Army I will of course do everything in my power to teach my fellow soldiers the truth about Vietnam and Non-violent principles. I will actively organize resistance. *If I choose not to go into the Army I will resist induction and make the biggest stink about it possible.* I must do this to bear witness to my beliefs and to cause my fellow citizens to think. . . ." [Italics ours]

By letter dated December 2, 1967, Mulloy advised the Board that he had been "fired" by the Appalachian Volunteers "for stating that I am a C.O. and would refuse induction if ordered"; and that as far as he knew he was still under bond to the Federal Court.

On December 6, a letter from the Clerk of the District Court at Lexington was placed in his file which stated that Mulloy was recently a plaintiff in a civil action filed on the Pikeville Docket, but that the Clerk had "no information of his ever being a defendant in a matter in this court either civil or criminal."

On January 3, 1968, Mulloy wrote to the Board stating that he was now employed by the Southern Conference Educational Fund in Louisville and was working on a book "about my experience with the Poverty War in Appalachia"; and that the sedition charges had been dropped and the bond released. He was not sure about the Pike County peace bond.

On January 19, 1968, he was advised by letter from the Board that his file had been reviewed at its meeting held on January 11th, and that the members felt that the information in his file did not warrant a reopening of his classification. On January 21, Mulloy wrote to the Board appealing from the Board's failure to reclassify him 1-O. He stated that he considered the November interview a reopening of his case. The Board wrote in reply two days later that it did not consider the courtesy appearance as a reopening of his case since his time for appeal and personal appearance had expired. He was ordered to report for induction on February 23, 1968, but refused to submit.

Selective Service Regulation 32 C.F.R. § 1625.2, entitled "When Registrant's Classification May Be Reopened And Considered Anew," provides in part that the Local Board may reopen and consider anew the registrant's classification upon written request of the registrant —

> ". . . if such request is accompanied by written information presenting facts not considered when the registrant

was classified, which, if true, would justify a change in the registrant's classification."

Selective Service Regulation 32 C.F.R. § 1625.4, entitled "Refusal to Reopen And Consider Anew Registrant's Classification," provides in part:

". . . [E]ven if new facts are presented, [when] the Local Board is of the opinion that such facts, if true, would not justify a change in such registrant's classification, it shall not reopen the registrant's classification."

Under Regulation 1625.2 the Board has discretion to determine whether or not it will reopen a classification, but Regulation 1625.4 appears to be mandatory in that the Board *shall not* reopen the classification when it is of the opinion that the facts, if true, do not justify a change in the classification.

In *Smith* v. *United States*, 157 F.2d 176 (4th Cir. 1946) Judge Soper, who wrote the opinion for the Court, said:

"Whether or not the additional evidence was of sufficient weight to require a reopening of the case lay within the discretion of the board and it cannot be said under the circumstances that the discretion was arbitrarily exercised." *Id.* at 181.

Smith was followed by the Seventh Circuit in *United States* v. *Bartelt*, 200 F.2d 385, 389 (7th Cir. 1952).

Mulloy contends that in determining whether to reopen the classification the Board was limited to consideration of only the Special Form For Conscientious Objector (SSS Form 150). In our judgment, the Board had not only the right but also the duty to consider not only the form but also the attachment thereto, the letters received in connection therewith and the entire file. This is implicit in the holdings of the Second Circuit in the two *Gearey* cases. *United States* v. *Gearey*, 368 F.2d 144 (2nd Cir. 1966); *United States* v. *Gearey*, 379 F.2d 915 (2d Cir. 1967).

In *Gearey*, the Board considered on the merits the request to reopen a classification after an order to report for induction, and the Court held that there was a rational basis for the Board's determination that the registrant was not a genuine conscientious objector and the Board therefore was not required to reopen his classification.

Appellant's contention, if upheld, would result in interminable delays in proceedings before Local Boards and indeed might frustrate the operation of the Selective Service System.

> "As the Tenth Circuit has pointed out, religious 'conversions' of convenience might well upset the orderly administration of the selective service system." *United States* v. *Taylor*, 351 F.2d 228, 230 (6th Cir. 1965).

Under Mulloy's contention, all a registrant needs to do is to state facts in support of his application and the Board is limited to his statement. In our judgment, the facts stated must be true and the Board has the power to investigate and determine the truth. Suppose a registrant who is classified 1-A requests the Board to reopen his classification and place him in 3-A, alleging that he is living with and supporting his wife and family. If appellant's allegations were true, the Board would be obligated to reopen his classification and reclassify him. *Townsend* v. *Zimmerman*, 237 F.2d 376 (6th Cir. 1956). However, the Board, under the investigative powers granted to it in 32 C.F.R. § 1625.1(c), may learn that the allegation was false. Is the Board nevertheless required to reopen his classification and reclassify him? We say, "No."

The Military Selective Service Act of 1967 omitted the provision contained in the 1940 Act for referral to the Department of Justice of conscientious objectors' claims, including the provision for appeal to the Appeal Board of Local Board action denying conscientious objector classification.

The legislative history of the statute indicates Congressional concern for "unusually long and unnecessary delay in processing

cases in the Department of Justice." H.R. No. 267, 90th Cong., 1st Sess. 1308, 1333-34 (1967). Congress was also of the belief that the decision of the Supreme Court in *United States* v. *Seeger*, 380 U.S. 163 (1965), had broadened the basis on which conscientious objection could be made, and resulted in an increase of administrative appeals and delays. The definition was changed so that conscientious objection must be based solely on religious training and belief, not including "essentially political, sociological, or philosophical views, or a merely personal moral code." 50 U.S.C.App. § 456(j).

Mulloy's letter dated November 17, 1967, from which we have quoted, indicated rather clearly that his objection to serving in the Armed Forces was based on essentially political, sociological or philosophical views and his conscience rather than on religious training and belief. He even indicated at that late date that he had not made up his mind as to whether he would go into the army. The letters which he wrote to the Board revealed that he was principally interested in an occupational deferment.

Furthermore, the Board had the right to consider inconsistent statements made by the registrant as well as any fact which cast doubt on his veracity. *Witmer* v. *United States*, 348 U.S. 375 (1955).

The Chairman of the Local Board testified in Court that the Board's decision was based on all information available, including the file and what he said. He further testified that Mulloy's claim for deferment was based principally upon his job. He testified:

> "His claim, taking everything, assuming everything he said down there at that time to be so, he still did not make out a case for conscientious objection and, therefore, we saw no reason to reopen the case, because it wasn't there."

The Act provides that classification orders of the Board shall be final. 50 U.S.C.App. § 460(b)(3). The Courts have

limited the scope of judicial review to a determination of whether there is basis in fact for the classification. *United States* v. *Seeger, supra; Dickinson* v. *United States,* 346 U.S. 389 (1953); *Estep* v. *United States,* 327 U.S. 114 (1946); *United States* v. *Jackson,* — F.2d — (No. 18,645, 6th Cir. March 24, 1969); *United States* v. *Beatty,* 350 F.2d 287 (6th Cir. 1965), *cert. denied,* 382 U.S. 1028. Mulloy relies upon *Miller* v. *United States,* 388 F.2d 973 (9th Cir. 1967) and *Freeman* v. *United States,* 388 F.2d 246 (7th Cir. 1967), which cases were decided under the 1940 Act and involved different facts. We regard the cases as inapposite.

In considering whether to reopen the classification, the Board had the right to take into account the original questionnaire filed by appellant in June, 1963. In Series VIII of that form under the heading of Conscientious Objector he printed: "Does Not Apply." Since his registration in 1962 he had been granted five years' deferments for college and occupation, an appeal before the Appeal Board, the cancellation of two orders to report for induction, and then when time was running out for him, he claimed for the first time on October 30, 1967, that he was a conscientious objector. Even then he was still maintaining that he should be classified in 2-A because of his work in Appalachia, and he had not made up his mind as to whether he would go into the army.

A letter written to the Board by his brother, Robert, while disagreeing with Mulloy's position, stated:

> "I believe my brother to be sincere concerning his feelings and he has maintained this position for a number of years."

If this were true, why did he wait so long to inform the Board?

It would further appear that what he wrote to the Board about being under a $5,000-bond in the Federal Court was not correct.

We are of the opinion that there was a rational basis for the Board's determination that Mulloy had not established a case of conscientious objection, and that the Board did not abuse its discretion in denying his request to reopen his classification. In our judgment, he did not make out a prima facie case of conscientious objection, and the additional information that he supplied did not justify a change in his classification. *United States* v. *Jackson, supra.* His claim to conscientious objection did not fool the Board nor the District Judge who, in sentencing him, said:

> "It is the observation of this court that in the trial of this matter you have worn out pretty well the claim of conscientious objector, which I think the record should reflect you did not assert for many, many months.[1]
>
> "In other words, in my judgment, you have suffered an instant conversion when you realized that the platoon sergeant was about to blow his whistle."

In our judgment, the courtesy hearing granted did not constitute a reopening of the classification. Other claims of error have been considered and are insufficient to warrant reversal.

The sentence of the court would appear to us to be rather severe. We do not have before us the presentence investigation which may have justified it. The District Court will have an opportunity to consider reduction of the sentence if request is made under Rule 35 of the Federal Rules of Criminal Procedure.

Affirmed.

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[1] It was about four years.

McCree, Circuit Judge, concurring. I concur in the result. Selective Service Regulation 32 C.F.R. § 1625.2 vests broad discretion in the Local Board, and since the Board was justified in considering the entire file (instead of being confined solely to appellant's conscientious objector application), I do not regard the decision not to reopen appellant's file as an abuse of that discretion. Accordingly, I find it unnecessary to consider the philosophical contours of conscientious objection in this appeal. I agree with the majority's statement questioning the propriety of imposing the maximum possible sentence in this case.

APPENDIX B

Order of the Court of Appeals Denying Petition for Rehearing

No. 18,709

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

FILED
AUG 25 1969
CARL W. REUSS, Clerk

UNITED STATES OF AMERICA, :

Plaintiff-Appellee :

vs : ORDER

JOSEPH THOMAS MULLOY :

Defendant-Appellant;

Before WEICK, Chief Judge, CELEBREZZE and McCREE, Circuit Judges.

Upon consideration, it is ORDERED that the petition for rehearing be denied.

Entered by order of the Court.

Carl W. Reuss
Clerk

APPENDIX C

Pertinent Text of Statute Involved

Military Selective Service Act of 1967
[50 App. U.S.C. Section 451 et seq.]

50 App. U.S.C. Section 456 (j)

Nothing contained in this title shall be construed to require any person to be subject to combatant training and service in the armed forces of the United States who, by reason of religious training and belief, is conscientiously opposed to participation in war in any form. As used in this subsection, the term "religious training and beliefs" does not include essentially political, sociological, or philosophical views, or a merely personal moral code. Any person claiming exemption from combatant training and service because of such conscientious objections whose claim is sustained by the local board shall, if he is inducted into the armed forces under this title, be assigned to noncombatant service as defined by the President, or shall, if he is found to be conscientiously opposed to participation in such noncombatant service, in lieu of such induction, be ordered by his local board, subject to such regulations as the President may prescribe, to perform for a period equal to the period prescribed in section 4(b) such civilian work contributing to the maintenance of the national health, safety, or interest as the local board pursuant to Presidential regulations may deem appropriate and any such person who knowingly fails or neglects to obey any such order from his local board shall be deemed, for the purposes of section 12 of this title, to have knowingly failed or neglected to perform a duty required of him under this title.

50 App. U.S.C. Section 462 (a)

Any member of the Selective Service System or any other person charged as herein provided with the duty of carrying out any of the provisions of this title, or the rules or regulations made or directions given thereunder, who shall knowingly fail or neglect to perform such duty, and any person charged with such duty, or having and exercising any authority under said title, rules, regulations, or directions who shall knowingly make, or be a party to the making, of any false, improper, or incorrect registration, classification, physical or mental examination, deferment, induction, enrollment, or muster, and any person who shall knowingly make, or be a party to the making of, any false statement or certificate regarding or bearing upon a classification or in support of any request for a particular classification, for service under the provisions of this title, or rules, regulations, or directions made pursuant thereto, or who otherwise evades or refuses registration or service in the armed forces or any of the requirements of this title, or who knowingly counsels, aids, or abets another to refuse or evade registration or service in the armed forces or any of the requirements of this title, or of said rules, regulations, or directions, or who in any manner shall knowingly fail or neglect or refuse to perform any duty required of him under or in the execution of this title, or rules, regulations, or directions made pursuant to this title, or any person or persons who shall knowingly hinder or interfere or attempt to do so in any way, by force or violence or otherwise, with the administration of this title or the rules or regulations made pursuant thereto, or who conspires to commit any one or more of such offenses, shall, upon conviction in any district court of the United States of competent jurisdiction, be punished by imprisonment for not

more than five years or a fine of not more than $10,000 or by both such fine and imprisonment, or if subject to military or naval law may be tried by court martial, and, on conviction, shall suffer such punishment as a court martial may direct. No person shall be tried by court martial in any case arising under this title unless such person has been actually inducted for the training and service prescribed under this title or unless he is subject to trial by court martial under laws in force prior to the enactment of this title. Precedence shall be given by courts to the trial of cases arising under this title, and such cases shall be advanced on the docket for immediate hearing, and an appeal from the decision or decree of any United States district court or United States court of appeals shall take precedence over all other cases pending before the court to which the case has been referred.

APPENDIX D

Pertinent Text of Regulations Involved

Selective Service Regulations
[32 C.F.R. Ch. XVI]

Part 1625–Reopening and Considering Anew Registrant's Classification.

Reopening Registrant's Classification

1625.1. Classification Not Permanent.–(a) No classification is permanent.

(b) Each classified registrant and each person who has filed a request for the registrant's deferment shall, within 10 days after it occurs, report to the local board in writing any fact that might result in the registrant being placed in a different classification such as, but not limited to, any change in his occupational, marital, military, or dependency status, or in his physical condition. Any other person should report to the local board in writing any such fact within 10 days after having knowledge thereof.

(c) The local board shall keep informed of the status of classified registrants. Registrants may be questioned or physically or mentally re-examined, employers may be required to furnish information, police officials or other agencies may be requested to make investigations, and other steps may be taken by the local board to keep currently informed concerning the status of classified registrants.

1625.2 When Registrant's Classification May Be Reopened and Considered Anew.–The local board may reopen and consider anew the classification of a registrant (a) upon the

written request of the registrant, the government appeal agent, any person who claims to be a dependent of the registrant, or any person who has on file a written request for the current deferment of the registrant in a case involving occupational deferment, if such request is accompanied by written information presenting facts not considered when the registrant was classified, which if true, would justify a change in the registrant's classification; or (b) upon its own motion if such action is based upon facts not considered when the registrant was classified which, if true, would justify a change in the registrant's classification; provided, in either event, the classification of a registrant shall not be reopened after the local board has mailed to such registrant an Order to Report for Induction (SSS Form 252) or an Order to Report for Civilian Work and Statement of Employer (SSS Form 153) unless the local board first specifically finds there has been a change in the registrant's status resulting from circumstances over which the registrant had no control.

1625.3 When Registrant's Classification Shall Be Reopened and Considered Anew.—(a) The local board shall reopen and consider anew the classification of a registrant upon the written request of the State Director of Selective Service or the Director of Selective Service and upon receipt of such request shall immediately cancel any Order to Report for Induction (SSS Form 252) or Order to Report for Civilian Work and Statement of Employer (SSS Form 153) which may have been issued to the registrant.

(b) The local board shall reopen and consider anew the classification of a registrant to whom it has mailed an Order to Report for Induction (SSS Form 252) whenever facts are presented to the local board which establish the registrant's eligibility for classification into Class 1-S because he is satisfactorily pursuing a full-time course of instruction at a

college, university, or similar institution of learning.

1625.4 Refusal To Reopen and Consider Anew Registrant's Classification.–When a registrant, any person who claims to be a dependent of a registrant, any person who has on file a written request for the current deferment of the registrant in a case involving occupational deferment, or the government appeal agent files with the local board a written request to reopen and consider anew the registrant's classification and the local board is of the opinion that the information accompanying such request fails to present any facts in addition to those considered when the registrant was classified or, even if new facts are presented, the local board is of the opinion that such facts, if true, would not justify a change in such registrant's classification, it shall not reopen the registrant's classification. In such a case, the local board, by letter, shall advise the person filing the request that the information submitted does not warrant the reopening of the registrant's classification and shall place a copy of the letter in the registrant's file. No other record of the receipt of such a request and the action taken thereon is required.

Classification Anew

1625.11 Classification Considered Anew When Reopened.–When the local board reopens the registrant's classification, it shall consider the new information which it has received and shall again classify the registrant in the same manner as if he had never before been classified. Such classification shall be and have the effect of a new and original classification even though the registrant is again placed in the class that he was in before his classification was reopened.

1625.12 Notice of Action When Classification Considered Anew.–When the local board reopens the registrant's classifi-

cation, it shall, as soon as practicable after it has again classified the registrant, mail notice thereof on Notice of Classification (SSS Form 110) to the registrant and on Classification Advice (SSS Form 111) to the persons entitled to receive such notice or advice on an original classification under the provisions of section 1623.4 of this chapter.

1625.13 Right of Appeal Following Reopening of Classification.–Each such classification shall be followed by the same right of appearance before the local board and the same right of appeal as in the case of an original classification.

1625.14 Cancellation of Order to Report for Induction or for Civilian Work by Reopening of Classification.–The reopening of the classification of a registrant by the local board shall cancel any Order to Report for Induction (SSS Form 252) or Order to Report for Civilian Work and Statement of Employer (SSS Form 153) which may have been issued to the registrant, except that if the registrant has failed to comply with either of those orders, the reopening of his classification thereafter by the local board for the purpose of placing him in Class IV-C or Class V-A shall not cancel the order with which he failed to comply.

APPENDIX E
Excerpts from Petitioner's Selective Service File

SSS Form 100

Approval not required.

SELECTIVE SERVICE SYSTEM
MINUTES OF ACTION—CONTINUATION SHEET

NAME OF REGISTRANT OR STANDBY RESERVIST	SS OR SR NUMBER
Mulloy, Joseph Thomas	15 47 44 153

Dates	Minutes of Actions	Vote Yes	Vote No
7-25-67	Order for Induction for Aug. 17, 1967 cancelled. Members	3	0
	permitted file to be forwarded to Appeal Board, even though		
	period of appeal had expired.		
7-25-67	File forwarde to Appeal Board		
8-24-67	Filed returned from appeal Board. Class. 1A by vote 5-0		
8-28-67	mailed SSS 110 (notice of class.) SSS 111 (class. advice)		
	to Mr. Thomas Rhodenbaugh, Bristol, Tenn.		
9/21/67	Mailed SSS 252, Order to Report for Ind., o. 10/10/67, SSS 127, DD 398 & instr., & DA Form 41.		
10/12/67 10-20-67	Order to report for induction on 10/16/67 cancelled. mailed SSS 140 (Spec. Form for C. O.)		
10/30/67	Registrant returned completed SSS Form 150. Also received		
11/9/67	letter requesting personal appearance. Registrant was granted a "courtesy personal appearance", classification was not re-opened. Board is to obtain additional information regarding appeal and bond.		
1-11-68	All information in file was considered including claim	4	0
	of Conscientious Objector. All Members present felt this		
	information did not warrant re-opening of 1A class.		
1-23-68	mailed SSS 252 (Ord. to rep. for Ind.Feb.23,1968) DD F 398 and Instr., Ky. Bar pamphlet, and SSS F 127		
2-27-68	papers returned from examining station--SSS 261 (Delivery		
	List) shows Refused Induction.		

Form approved.
Bureau of the Budget No. 33-R311

SELECTIVE SERVICE SYSTEM

SPECIAL FORM FOR CONSCIENTIOUS OBJECTOR

Selective Service
Local Board No. 47
Room 106, VA Building
1405 W. Broadway
Louisville, Ky. 40203

(Local Board Stamp)

THIS FORM MUST BE RETURNED ON OR BEFORE
Oct. 30, 1967
(Ten days after mailed or issued)

Date of mailing or issue Oct. 20, 1967
Date received back at local board

1. Name of Registrant (Last)	(First)	(Middle)	2. Selective Service No.
Mulloy	Joseph	T.	15 47 44 153

3. Mailing address: Rt. 2 Box 928 (Number and street or R.F.D. route) Pikeville, (City, town, or village) Kentucky (County) (State) (ZIP Code)

INSTRUCTIONS

A registrant who claims to be a conscientious objector shall offer information in substantiation of his claim on this special form, which when filed shall become a part of his Classification Questionnaire (SSS Form 100).

The items in Series II through V in this form are intended to obtain evidence of the genuineness of the claim made in Series I, and the answers given by the registrant shall be for the information of only the officials duly authorized under the regulations to examine them.

In the case of any registrant who claims to be a conscientious objector, the local board shall proceed in the prescribed manner to determine his proper classification. The procedure for appeal from a decision of the local board on a claim of conscientious objection is provided for in the Selective Service Regulations.

Failure by the registrant to file this special form on or before the date indicated above may be regarded as a waiver by the registrant of his claim as a conscientious objector; *Provided*, that the local board, in its discretion, and for good cause shown by the registrant, may grant a reasonable extension of time for filing this special form.

Series I.—CLAIM FOR EXEMPTION

INSTRUCTIONS.—The registrant must sign his name to either statement A or statement B in this series but not to both of them. The registrant should strike out the statement in this series which he does not sign.

(A) I am, by reason of my religious training and belief, conscientiously opposed to participation in war in any form. I, therefore, claim exemption from combatant training and service in the Armed Forces.

(Signature of registrant)

(B) I am, by reason of my religious training and belief, conscientiously opposed to participation in war in any form and I am further conscientiously opposed to participation in noncombatant training and service in the Armed Forces. I, therefore, claim exemption from both combatant and noncombatant training and service in the Armed Forces.

(Signature of registrant)

Under the provisions of section 6 (j) of the Universal Military Training and Service Act, as amended, any person who claims exemption from combatant training and service in the Armed Forces of the United States because he is, by reason of religious training and belief, conscientiously opposed to participation in war in any form and such claim is sustained by the local board, shall, if he is inducted into the Armed Forces, be assigned to noncombatant service as defined by the President, or shall, if found to be conscientiously opposed to participation in such noncombatant service, in lieu of induction, be ordered by his local board, subject to regulations prescribed by the President, to perform for a period of twenty-four consecutive months such civilian work contributing to the maintenance of the national health, safety, or interest as the local board deems appropriate, and any such person who fails or neglects to obey such order of the local board shall be subject to imprisonment for not more than five years or a fine of not more than $10,000, or to both such fine and imprisonment.

Series II.—RELIGIOUS TRAINING AND BELIEF

INSTRUCTIONS.—Every item in this series must be completed. If more space is needed use extra sheets of paper.

1. Do you believe in a Supreme Being? ☒ Yes ☐ No

2. Describe the nature of your belief which is the basis of your claim made in Series I above, and state whether or not your belief in a Supreme Being involves duties which to you are superior to those arising from any human relation.

See appendix

SSS Form 130 (Revised 9-9-52). (The printing of 1-21-52 shall be used until exhausted.)

3. Explain how, when, and from whom or from what source you received the training and acquired the belief which is the basis of your claim made in Series I above.

See appendix

4. Give the name and present address of the individual upon whom you rely most for religious guidance.

See appendix

5. Under what circumstances, if any, do you believe in the use of force?

See Appendix

6. Describe the actions and behavior in your life which in your opinion most conspicuously demonstrate the consistency and depth of your religious convictions.

See appendix

7. Have you ever given public expression, written or oral, to the views herein expressed as the basis for your claim made in Series I above? If so, specify when and where.

See appendix

Series III.—GENERAL BACKGROUND

INSTRUCTIONS.—Every item in this series must be completed. If more space is needed use extra sheets of paper.

1. Give the name and address of each school and college which you have attended, together with the dates of your attendance; and state in each instance the type of school (public, church, military, commercial, etc.).

Name of School	Type of School	Location of School	Dates Attended	
			From—	To—
See Appendix			19	19
			19	19
			19	19
			19	19

2. Give a chronological list of all occupations, positions, jobs, or types of work, other than as a student in school or college, in which you have at any time been engaged, whether for monetary compensation or not, giving the facts indicated below with regard to each position or job held, or type of work in which engaged.

Type of Work	Name of Employer	Address of Employer	Period Worked	
			From—	To—
See Appendix			19	19
			19	19
			19	19
			19	19
			19	19
			19	19

3. Give all addresses and dates of residence where you have formerly lived.

Name of City, Town, or Village	State or Foreign Country	Street Address or R. F. D. Route	Dates of Residence From—	To—
See Appendix			19....	19....
			19....	19....
			19....	19....
			19....	19....
			19....	19....
			19....	19....

4. Give the name and address of your parents and indicate whether they are living or not.

Mr. and Mrs. Joseph P. Mulloy; Living

5. (a) State the religious denomination or sect of your father Catholic

(b) State the religious denomination or sect of your mother Catholic

Series IV.—PARTICIPATION IN ORGANIZATIONS

INSTRUCTIONS.—Every item in this series must be completed. If more space is needed use extra sheets of paper.

1. Have you ever been a member of any military organization or establishment? If so, state the name and address of same and give reasons why you became a member.

No.

2. Are you a member of a religious sect or organization? ☒ Yes ☐ No. If your reply to item 2 is "yes," complete items (a) through (e).

(a) State the name of the sect, and the name and location of its governing body or head if known to you.

Roman Catholic Church Pope Paul Rome, Italy

(b) When, where, and how did you become a member of said sect or organization?

In June of 1944 at Baptism

(c) State the name and location of the church, congregation, or meeting where you customarily attend.

Due to the fact that I travel a lot and there are few Catholic Churches nearby I cannot maintain regular attendence. I am spiritually close to St. Anthony Church, Norton, Va.

(d) Give the name, title, and present address of the pastor or leader of such church, congregation, or meeting.

Fr. William Browne, St. Anthony Church, Norton, Va.

(e) Describe carefully the creed or official statements of said religious sect or organization in relation to participation in war.

Pope Paul said before the UN "No more war, no never again. If you wish to be brothers let the weapons fall from your hands."

3. Describe your relationships with and activities in all organizations with which you are or have been affiliated, other than military, political, or labor organizations.

I am working to improve the lot of the poor with the following organizations: VISTA, the OEO, the Highlander Education Center, the Council of Southern Mtns.; the Appalachian Volunteers, numberous community action programs, the Southern Conference Educational Fund, The Southern Student Organizing Committee, The Appalachian Group to Save the Land and People, the Marrowbone Flok School, JOIN in Chicago, the Glenmary Southern Project, and many more.

Series V.—REFERENCES

INSTRUCTIONS.—This series must be completed. If more space is needed use extra sheets of paper.

Give here the names and other information indicated concerning persons who could supply information as to the sincerity of your professed convictions against participation in war.

NAME	POST ADDRESS	OCCUPATION OR POSITION	RELATIONSHIP TO YOU
Fr. William Browne	St. Anthony Chur. Norton	Va. Priest	friend
Thorsten Horton	PO Box 2533 Pikeville,Ky	Teacher	friend
Carl Braden	3210 W. Broadway, Lou,Ky	Organizer	friend
Mrs. J. P. Mulloy	229 N. 37; Louisville,Ky	Housewife	mother

REGISTRANT'S CERTIFICATE

INSTRUCTIONS.—Every registrant claiming to be a conscientious objector shall make this certificate. If the registrant cannot read, the items and his replies thereto shall be read to him by the person who assists him in completing this form. If the registrant is unable to sign his name he shall make his mark in the space provided for his signature in the presence of two persons who shall sign as witnesses.

NOTICE.—Imprisonment for not more than five years or a fine of not more than $10,000, or both such fine and imprisonment, is provided by law as a penalty for knowingly making or being a party to the making of any false statement or certificate regarding or bearing upon a classification. (Universal Military Training and Service Act, as amended).

I, Joseph T. Mulloy, certify that I am the registrant named and described in the foregoing statements in this form; that I have read (or have had read to me) the statements made by and about me, and that each and every such statement is true and complete to the best of my knowledge, information, and belief. The statements made by me in the foregoing ATS (item, use pen) is my own handwriting.

Registrant sign here JTM

(Signature or mark of registrant)

(Signature of witness to mark of registrant) Oct. 26, 1967 (Date)

(Date)

(Signature of witness to mark of registrant)

(Date)

If another person has assisted the registrant in completing this form, such person shall sign the following statement:

I have assisted the registrant herein named in completing this form because

(Fact assisting registrant (such as inability to read and write English, etc.))

(Signature of person who has assisted)

(Occupation of person who has assisted)

(Address of person who has assisted)

(Date)

U.S. GOVERNMENT PRINTING OFFICE: 1950-O-774-000

APPENDIX TO SPECIAL FORM FOR CONSCIENTIOUS OBJECTOR

SERIES II – RELIGIOUS TRAINING AND BELIEF

2 My religious training taught me that it is against God's law to kill. To be a member of the Armed Services of this country or any other would oblige me to either kill or indirectly assist in killing. I also believe that the message of Jesus is love for all mankind. We as his children are to imitate Jesus' love for men.

Yes, my belief in a Supreme Being does involve duties to which I am superior to those arising from human relation.

3 I was born to Catholic parents on June 1, 1944, and was baptized into the Catholic Church shortly thereafter. I attended St. Anthony and St. Columbia grade schools in Louisville. I studied the Bible and the meaning of various stories and parables such as the prodigal son and parable of the vinyard. I learned the catechism, the sacraments, the Ten Commandments, and the life of Jesus. In short, I learned the basic rudiments of Christian teachings. In the sixth grade I became an alter boy and assisted the priests at Mass regularly. I even once served the Archbishop in an Easter observance.

Missionary orders such as the Glenmary and the Maryknoll used to visit my class often in the eighth grade to tell us of their work. I was inspired by them and decided to become a priest. However, by high school time I was not sure and decided to wait. I was a young lad,

knowledgeable in the teachings of Christ but still ignorant as to their real meaning or significance. I needed more experience.

I entered Flaget High in 1958. The Xaverian Brothers were quite a change from the Nuns. We concentrated not on rote memorization but on understanding the laws and mysteries of the Church. God's love for man was a constant theme.

The motto of Bellarmine College is "In the search of truth." By the time I enrolled in the school I had begun my own search for truth. I began to doubt and I fancied myself an agnostic, then an atheist. I was rebelling and I went through an extremely hard religious crisis. This religious crisis coupled with several failures in my personal life and the sudden illness of my father caused me to despair. I attempted suicide.

During my recovery I began to read and grow again. I reenrolled in college and came back to the Church. I discovered Thomas Merton in a Monastery near Bardstown. Through his writings and poems he quickly became my mentor and spiritual advisor. I devoured everything that he wrote and found a great similarity between our lives and thoughts. An internal struggle was being waged inside of me again. I felt I was being pulled to the monastic life. Merton had chosen the life of prayer, the life of solitude. He was the outstanding example that the materials of this world were meaningless. He said that man must conquer himself before he could know fulfillment. Merton was non-violent. He was a hermit. He was "drunk with God."

I was attracted and deeply influenced. Many times I went to the Monastery to gaze at the gray walls, to walk in the garden and to be near the men who live but for God.

About this same time, 1965, I became involved with the Appalachian Volunteers. I jumped into this work with missionary zeal, determined to right the injustices. I was an organizer. Imbued with a sense of history and determined that I was right I threw myself into my work.

I found that this was the point that Merton and I differed on. He was a contemplative. He found his way to God in solitude and prayer. But I was an activist, a worker in the world. I found my solace and comfort in people. This was my path.

As I have tried to show my religious training has taught me basic laws of God. Love of God in every man is the supreme goal.

As I grew and participated in the world I was able to determine a priority on the things I learned as a child. Thus I place love of my fellow man above regular church attendance. And I place Thou Shalt Not Kill above An Eye For An Eye. I learned rapidly in my work in the southern Highlands of the significance of love and understanding and the futility of violence and force. Too many poor people have been used and walked on by the power hungry courthouse gangs. There is an urgent need for the poor to become organized and the rich to be educated. This must be done in a non-violent way.

Violence only breeds violence.

As a young man I was not taught to be against the use of violence as such. But I was taught not to kill and to love all men. This coupled with my adult experience has brought me to my present position. It was only through and after my adult experience that I became a CO.

4 Thomas Merton, Gethsthemini, Ky., Jesus Christ.

5 I believe in the force of non-violence.

6 I am spending my life non-violently working among the poor. When I helped organize Jink Ray's resistance to strip mining I urged non-violent methods. I was successful and bloodshed was averted in a very tense situation. I have supported peace demonstrations to end the war in Vietnam. I have written letters to my Senators and signed a petition to President Johnson urging a negotiated peace in Vietnam.

7 I have trained many groups of VISTA volunteers for work in Appalachian communities. I had several occasions to tell such groups that non-violent change was what was needed in East Kentucky. I led discussions on non-violent organizing techniques. I have talked and expressed my views on this subject privately many times to my wife and friends. And I stated under oath in the U.S. 6th District Federal Court in Lexington in September of this year that I did not advocate the violent overthrow of any government. I stated I believe in the peaceful means provided for in the Constitution and the democratic process.

APPENDIX TO SPECIAL FORM FOR CONSCIENTIOUS OBJECTOR

SERIES III-- GENERAL BACKGROUND

1.

School	Type	Location	Dates
St. Anthony	Church	Louisville,Ky.	1950-51
St. Columbia	Church	Louisville,Ky.	1951-58
Flaget High	Church	Louisville,Ky.	1958-62
Bellarmine College	Church	Louisville,Ky.	1962-63
U of Louisville	Public	Louisville,Ky.	1963-64
U of Kentucky	Public	Lexington, Ky.	1964-65
U of Louisville	Public	Louisville,Ky.	1965-66

2.

Work	Employer	Address	Dates
Organizer	Council of Southern Mts.	Berea,Ky.	Jan-June,'66
Organizer	Appalachian Volunteers	Bristol,Te.	June '66-Now
Teacher	Highlander Education Cen	Knoxville	1966-Now

3.

Town	State	Address	Dates
Pikeville	Ky.	Box 928,Rt. 2	Mar. 67-present
Wise	Va.	Box 151 Rt. 1	Nov 66-Mar 67
Norton	Va.	1522 Main Ave.	Jul 66-Nov 66
Bristol	Tenn.	102 19th St.	May 66-Jul 66
Berea	Ky.	102 Boone St.	Jan 66-May 66
Louisville	Ky.	229 N. 37 St.	until Jan 66

Oct 17, 1967
Box 928 Rt. 2
Pikeville, Ky.

Selective Service System
Local Board No. 47
1405 W. Broadway
Louisville, Ky.

Dear Sir,

I am writing to formally request a conscientious objector application form. I wish to file a CO claim.

After much, much thinking, seeking, and questioning of my own religious upbringing and political experience I have concluded that I am a conscientious objector. I am therefore opposed to war in any form.

In my studies of history I have found a strong correlation between religious practices and political realities. In essence the two are almost interchangeable. The prevailing religious attitude of a certain age almost consistently justifies the politics of that age. And when the politics of men demand new conquests or an expansion of the economy the religion was tailored to the situation. I point out the Crusades, the settlement of the American West, and the Vietnam War as three easy examples. The Crusades were launched under the guise of returning the Holyland to the Christians; the atrocities committed in the West were done under the banner of "Manifest Destiny" with bible quoting missionaries leading the way; and the most inhumane of all wars, the one in Vietnam, is justified as a stand against godless communism.

When I was a small child I was taught that men should love their fellow man and Thou Shalt Not Kill. But a child is taught many things and few have any real significance or understanding until the child reaches adulthood. The adult begins to move about in the world testing his early lessons, discarding some, keeping others until with maturity he forms his personal beliefs.

My adult experience has caused me to testseverelymany of my early teaching. The gross injustices in society have caused me to question my own existence, the dishonesty and greed of the politicians in Eastern Kentucky have made me angry, and the horror's of war have thrilled me at the moves and privately made me shiver.

I have been taught, I have experienced, and I have decided I cannot, I wil not, participate in the injustices, the killings, and the wars. I will adhere to the basic teaching of Jesus and do everything I can to promote peace, understanding and Love. It is with these thought in mind that I request to be classified a conscientious objector.

For your interest I am still employed by the Appalachian Volunteers, Inc. Present projects include stopping strip mining, establishing a welfare rights organization, and research on absentee owned coal fields.

Also inclosed is a newspaper which will give you some background on the sedition charge along with literature on an anti-war demonstration which I am planning to attend.

Please send the CO form.

Sincerely,

Joseph T. Mulloy
15-47-44-153

Nov. 12, 1967

Selective Service
Local Board No. 47
Louisville, Ky.

Dear Sir:

I have been thinking about the short interview I had with you all last week. It doesn't seem to me that all the points were covered that should have been and that I was not able to fully express my position of conscience.

These are certainly troubled times in this country. There are millions of black people and poor white people who have never had a say about any thing they are beginning to organize. They are beginning to organize for freedom and equality, the two great principles of the Bill of Rights. But this struggle is hitting head on the capitalist ruling class that has disregarded our Constitution for the profit motive. I believe that another revolution is beginning to take place in this country, that this country's government can no longer deal with its internal problems.

I of course hope that this revolution takes a non-violent form. It is important that men begin now to understand each other. That is why I hope that you understand me. You have me over the barrel, so to speak, in that you have the law behind you. But I remind you that I am an organizer. That I have dedicated my life to change and to the constant struggle that is democracy. There is nothing that can stop me

from organizing against something I don't believe.

This brings us to the war in Vietnam and my draft situation. I do not question individual integrety or your right by law to do what you do. I do however believe that every citizen has the duty of dissent, even resistance, regarding acts which violate his conscience.

I told you I felt that I was serving my country's needs here in Pike County. That was no frivolous statement. The problems are too great to be ignored any longer and no one should be sent to another country as long as we are in the mess we are in. Since I believe my country's course to be wrong in Vietnam, I feel that I would be serving my country's best interest, now and in the future generations, to follow my conscience.

I feel that you are going to try to draft me anyway, regardless of my feelings. I have not made up my mind as yet. If I decided to go into the Army I will of course do everything in my power to teach my fellow soldiers the truth about Vietnam and Non-violent principles. I will actively organize resistance. If I choose not to go into the Army I will resist induction and make the biggest stink about it possible. I must do this to bear witness to my beliefs and to cause my fellow citizens to think.

I know that I will eventually face prison. I am not afraid of that. Greater men than I have pulled time for practicing what they believe. When Emerson visited Thoreau in jail for not paying taxes to the Mexican War he asked "What are you doing in there?" Thoreau answered "What are you doing out there?"

It is a sad time but what must be must be. Before now I have not done any draft organizing. I have restricted myself to work with the dispossessed coal miners of Appalachia. But I believe it to be the same battle.

I submit this to you representing the government with all due respect.

Sincerely,

Joseph Mulloy

Saint Anthony's Church
Norton, Virginia 24273

St. Mary's Church
Coeburn, Virginia

St. Joseph's Church
Clintwood, Virginia

October 30, 1967

Local Board No. 47
1405 W. Broadway
Louisville, Kentucky

Re: 15-47-44-153

Dear Sirs:

This letter is a request on the behalf of Joseph T. Mulloy. I request that you consider his position that he finds participation in war as morally offensive to his conscience and therefore be granted a classification as a conscientious objector.

I am personally acquainted with Joseph T. Mulloy and can attest to his moral integrity and veracity. His personal conscience finds that participation in war is incompatible with his moral convictions, consequently, military service would do violence to his conscience.

The Catholic Church has always maintained that participation in a just war is morally defensible. However, moral

theologians and the Church, in particular, has always insisted that each individual must follow his own conscience. This is the basic moral principle in Catholic moral theology. Consequently, even in view of overwhelming approval in a given moral consideration the Church has always respected the convictions of the individual conscience.

In view of my personal association with Joseph T. Mulloy and our Church's defense of the inviolability of the individual's conscience, I request that you grant the registrant a draft classification as a conscientious objector.

If further clarification is necessary in this matter I will be happy to appear personally before your Board to answer any questions.

Respectfully yours,

(Rev.) William F. Browne

October 27, 1967

Thorsten Horton

Box 2533
Pikeville, Kentucky

Kentucky Local Board Number 47
Selective Service System
1405 West Broadway
Louisville, Kentucky

Re: Mr. Joseph Mulloy, Box 928, Route No. 2, Pikeville, Kentucky

Dear Sir:

Mr. Mulloy has asked me to be a reference for his sincerity in requesting status as a conscientious objector.

I met Joe Mulloy in the Fall of 1966 in connection with developing a field study project in Southern Appalchia for college students. From this first meeting until the present time, including his experience in the courts involving sedition charges, I have observed in Joe Mulloy what I would call genuine Christian love and concern for the Christian brotherhood of Man. In my estimation, Joe could not have endured the persecution he received related to his court experience if he had not had faith in the goodness of Man.

In the recent encounter involving the Appalachian Group to Save the Land and People and the Puritan Coal Company,

Joe Mulloy demonstrated his belief in nonviolence by convincing members of the Appalachian Group to leave their arms at home, thus avoiding what could have been a terrible waste of human life.

Please feel free to write or call–(606) 432-3189.

I sincerely hope that you will honor his request.

Sincerely,

Thorsten Horton
Director of the Appalachian Field Study Center (A Project of the Union for Research and Experimentation in Higher Education)
Visiting Instructor at Pikeville Coll.

TH/mh

APPENDIX F

Excerpts from Transcript of Proceedings,
Mulloy v. Selective Service Board
No. 47 et al., U.S. Dist. Ct., W.D.Ky., February 16, 1968
Hon. Henry L. Brooks, U.S. District Judge

J. ALLEN SHERMAN - RECROSS EXAMINATION

Q. Is it your position that the statements that Mr. Mulloy made in SS Form 150 and the statements that he made on the interview and the supporting letters that were sent, even if true, would not justify a reopening of his classification?

A. Taking everything that he – he did not make out – his claim was principally on his job, the work he was doing, and that was what he was attempting to do at the time he was down there personally.

Now, I went over his 150 Form. What's in it, now, I couldn't tell you. I don't know. And I don't know what's in the other registrants' file. His claim, taking everything, assuming everything that he said down there at that time to be so, he still did not make out a case for a conscientious objection and, therefore, we saw no reason to reopen the case, because it wasn't there.

Q. Then you based – then are you saying that you based your decision not to reopen on the testimony he gave at the oral interview rather than the answers he gave on SSS Form 150?

A. We try to base all our decisions on all the information available, including the file and what he says.

Q. Is it your position, then, that on all the information available, that is, his testimony at the hearing, SS From 150

and whatever other information you had in his file, he did not make out a prima – a case for Conscientious Objector Status?

A. I didn't follow you on your whole question.

Q. Is it your position that on all the information that you have, that is, his testimony at the hearing, his answers on SS Form 150 and other information in his file, this did not make out a case that he was entitled to a deferment?

A. Well, I think the file speaks for itself. The action taken is the conclusion we came to, and it was based on all the information we had, what he had furnished us, the letters he had sent in with his 150 Form and the information that he had given when he appeared in person.

Q. And that all of this, even if true, would not have entitled him to have his classification reopened?

A. All the information that we had, we came to the conclusion as we recorded on the file.

Q. Thank you. That's all.

A. Yes, sir.

(WITNESS EXCUSED)

APPENDIX G

**Excerpts from Transcript of Proceedings,
United States of America v. Joseph Thomas Mulloy,
U.S. Dist. Ct., W.D.Ky., April 5 1968
Hon. James F. Gordon, U.S. District Judge**

* * * * * * * * * * * * * *

MRS. MARGARET GREEN, called as a witness, by the plaintiff, having been first duly sworn, was examined and testified as follows, to-wit:

* * * * * * * * * * * * * *

CROSS EXAMINATION BY MR. SEDLER

***

Q. So that a registrant who is classified as 1-O then has a special proceeding before the Board?

A. That's right.

Q. At which time he then receives an order to report for civilian work?

A. That's right.

Q. Do you recall any such proceedings within –

A. (Interrupting) I have never had one in my Board.

Q. You have never had one in your Board?

A. (Witness shook in the negative.)

Q. Where a registrant was ordered to report for civilian work?

A. No, I have not.

MR. SEDLER: Thank you; no further questions.

* * * * * * * * * * * * * *

MR. ROBERT T. DOWNES, called as a witness, by the defendant, having been first duly sworn, was examined and testified as follows, to-wit:

DIRECT EXAMINATION BY MR. SEDLER

* * * * * * * * * * * * * *

Q. At the time, or I should say prior to the time of the meeting, this was the first time that you were aware of Mr. Mulloy?

A. I had never met him.

Q. You had never met him. Were you aware that he was a registrant of your Board?

A. No.

Q. No. Prior to the meeting did you read his file, his

Selective Service file?

A. The file is available before he presented himself, yes.

Q. And you read it?

A. I scanned it because I am the newest member on this particular Board and I was not familiar with what was in his file at all.

Q. You weren't. You just scanned the file then?

A. (Witness nodded his head in the affirmative.)

Q. When a registrant claims classification as a Conscientious Objector he must complete SS Form 150, must he not?

A. I believe this is the procedure, yes, sir.

Q. Do you know if, when you went through Mr. Mulloy's file, did you find that he had completed the SS Form 150?

A. I couldn't say.

Q. You don't remember that?

A. No, because as I recall his file was fairly thick.

Q. Fairly thick.

A. And I'm not familiar with the various forms by the particular numbers.

Q. Well, you knew though that applicants for Conscientious Objector status must complete a special form; is that correct?

A. Yes.

Q. Did you read, then, the form that he had filled out, his form for classification, as a Conscientious Objector?

A. I don't remember.

* * * * * * * * * * * * *

Q. During the time that you have been a member of the Board do you recall how many requests for Conscientious Objection status have been made before the Board?

A. Except in a general way, there have been very few.

Q. Have you – do you recall any of these requests having been granted?

A. A change in status?

Q. No, given the status of a Conscientious Objector, a 1-0 classification?

A. I don't recall of any.

Q. You don't recall of any of that being – any of that being done?

A. No.

Q. Do you recall the interview with Mr. Mulloy on November 9th?

A. Yes, I remember that he did appear before the Board.

Q. He did appear. You don't remember if you had read his file before he appeared?

A. I did not read each sheet in his file; the file was there.

Q. You don't remember if you read his answers to the form required by conscientious objectors; is that right?

A. That's correct.

Q. Did you feel that you could make a judgment without having read thoroughly his answers to the form?

A. There was no judgment required at this particular time.

Q. Oh, so that no judgment was made on November 9th; is that correct?

A. No, I – you asked if I had read the file before he appeared.

Q. Oh, well, you did read it that evening while he was –

A. (interrupting) No, at the time the Board met the file was there and there were several members of the Board present at this particular time and the clerk had informed us that we had a person who had requested to appear before the

Board.

Q. So, this was the first time you knew of this?

A. Knew of what?

Q. That Mr. Mulloy was trying to be claiming status as a Conscientious Objector?

A. Yes, and –

Q. (Interrupting) And – I'm sorry; continue.

A. And at that time, the clerk said that the individual was waiting – was there, and all of the Board members, I believe, or those who cared to looked in the file, but as far as reading each separate sheet is concerned, I don't believe that I did this.

Q. We are not concerned about each special sheet. I am concerned about what we call the SS Form 150 which is the special form for Conscientious Objectors that all applicants for this status must complete. You don't recall reading that?

A. Not specifically.

Q. Not specifically. How long did the interview last with Mr. Mulloy that evening; do you recall?

A. It's a fairly short time.

Q: About ten minutes?

A. I'd say ten, fifteen minutes, something like that; something in that neighborhood.

Q. Ten, fifteen minutes; and did you ask Mr. Mulloy any questions at that time?

A. As I recall, Mr. Mulloy did all of the talking.

Q. Mr. Mulloy did all of the talking and you didn't ask him any questions?

A. No, I don't recall that I did.

* * * * * * * * * * * * *

Q. Very well; you were aware Mr. Mulloy was seeking to be classified as a Conscientious Objector; is that correct?

A. On the basis of what he submitted to the Board when he appeared before us.

Q. Yes, and you understand – you are thoroughly familiar with the law – let's say with the regulations governing the classification of Conscientious Objectors?

A. I can't say that I'm thoroughly familiar. As indicated to you before, I am perhaps the youngest person on the particular Board, I don't know whether this pertains in this case or not, but ordinarily when the meets we go through whatever the cases are that are before us, what is presented, and then we act on this, but I could not quote to you in terms of –

Q. (Interrupting) I don't mean to quote; I would just like a general – if you have a general understanding of what a conscientious objector is and the policy of your draft Board concerning conscientious objectors?

A. In a general sense, yes.

Q. Would you tell us what this is?

A. Well, it is my understanding that if a person declares that he is a conscientious objector that rather than going into the military he could serve in some other capacity.

Q. Well, the draft Board has to make that decision, doesn't it? He can't do it just on his own.

A. The draft Board, I thought now, was involved primarily with determining the availability of people.

* * * * * * * *

Q. How much time would you say that you spent reviewing Mr. Mulloy's file prior to the January 11th meeting?

A. I don't know; the only –

Q. (Interrupting) Ten minutes?

A. The only time that I would have had an occasion to even consider the file would have been during one of the Board meetings or before the meeting started.

Q. Before the meetings; in other words, you wouldn't take it home and study it carefully?

A. No.

Q. Now, you are prepared to state under oath, that you feel that you gave full and fair consideration to his claim; is that correct?

A. I believe so, on the basis of what was discussed, what we were able to glean from his own statements.

* * * * * * * * * * * * * *

MR. FRANK J. WOLKING, called as a witness, by the defendant, having been first duly sworn, was examined and testified as follows, to-wit:

DIRECT EXAMINATION BY MR. SEDLER

* * * * * * * * * * * * * *

Q. Prior to the meeting of November 9th did you go through his file?

A. If his file came up I went through his file, but I wouldn't recall having specifically gone through his file.

Q. You wouldn't recall. Well, you knew his case was coming up?

A. I knew his – I knew he was coming to visit, coming to the Board for a hearing.

Q. Did you know that he had requested a reopening of his classification so that his claim for Conscientious Objector status could be considered?

A. I knew that Mrs. Green, the Board's secretary, had told us that he had asked for a courtesy hearing and it wasn't a regular hearing, but he wanted to come and make some statements and that's all I knew.

Q. So, you did not know at that time that he was acting for Conscientious Objector classification?

A. No.

Q. Then, you did not go, prior to the hearing, read thoroughly his responses to the SS Form 150?

A. I would say I absolutely did, but I wouldn't recall having done it.

Q. But if you did –

A. (Interrupting) If his case came before the Board I would have read whatever was in the Form 150.

Q. The Selective Service Form 150?

A. That's right.

Q. And your conclusion after reading – how much time did you spend on that form, would you estimate?

A. I wouldn't recall that.

Q. Your conclusion after reading that form was that this did not entitle him to a reopening of his classification?

A. That is correct.

Q. How long did the interview last at that time?

A. I wouldn't recall that either; possibly ten or fifteen minutes.

Q. About ten or fifteen minutes; and what questions – do you recall what questions you asked Mr. Mulloy that evening?

A. No, I don't think that I asked him any questions and I don't remember any.

Q. You don't think you asked him any questions?

A. I don't think I did.

Q. Do you recall any members of the Board asking him any questions?

A. No, I don't.

* * * * * * * * * * * * * *

* * * * * * * * * * * * * *

CROSS EXAMINATION BY MR. HUDDLESTON

Q. As I understand it then, you did not inquire into his sincerity, but the prima facie case that he presented?

A. That is quite true.

Q. Assuming that he was sincere?

A. We assumed he was sincere, that's right.

Q. You stated that he talked about or based his claim on the importance of his work in Appalachia?

A. That is the impression I have or that is the impression I remember.

Q. He was asking for a Conscientious Objector status because he had important work in East Kentucky?

A. That's right.

* * * * * * * * * * * * * *

REDIRECT EXAMINATION BY MR. SEDLER

* * * * * * * * * * * * * *

Q. Now, if an individual makes this statement and the Board agrees with him, that is, it finds as a fact that he is by reason of his religious training and belief conscientiously opposed to participation in war in any form and further, conscientiously opposed to participation in noncombatant training and service in the Armed Forces, what happens?

A. How do you mean what happens?

Q. What classification does he get?

A. Well, if the Board doesn't consider this he stays in this 1-A.

Q. Now, if the Board considers it favorably, what classification does he get? If the Board considered Mr. Mulloy's claim favorably, what classification would he have been given?

A. (No response)

Q. Well, what classification would he be given?

A. I believe I'm correct in stating that he would be offered a position in some hospital or some work that would permit him to serve in some other manner.

Q. Right, so that by signing this statement then Mr. Mulloy would have indicated his willingness to perform civilian service in the national interest?

A. Well, I believe it says he wouldn't, doesn't it? Isn't that correct?

Q. No, where does it say that he wouldn't perform this?

A. I therefore claim exemption from both combatant and noncombatant training and service in the Armed Forces.

REDIRECT EXAMINATION BY MR. SEDLER

* * * * * * * * * * * * *

THE WITNESS: I mean everything that was in the Form 150 and everything he said, in other words, everything was taken into consideration in the record and that's what my decision was based on.

Q. And that even – in other words, you did not question his sincerity, I take it?

A. That is correct.

Q. You believed his sincerity – you believed that everything he said, even if true, would not entitle him to be a

conscientious objector?

A. Everything that was in the record and what he said.

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MR. ROBERT H. RICKERT, called as a witness, by the defendant, having been first duly sworn, was examined and testified as follows, to-wit:

DIRECT EXAMINATION BY MR. SEDLER

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Q. When did you first become aware that Mr. Mulloy was registered before your Board?

A When he was registered.

Q. Yes. When did you identify – when did you know that a fellow named Mulloy was a registrant before you?

A. Possibly it was called to my attention on the 11th, the second meeting, in January.

Q. Oh, then you were not at the meeting of November 9th when Mr. Mulloy was –

A. (Interrupting) I was not at that meeting.

Q. Did you discuss the action at the meeting of November 9th with any members of the Board or with the clerk?

A. Only at meeting on January – in January.

Q. So that you were not aware prior to January 9th that Mr. Mulloy's case was going to come up that evening (sic)?

A. No.

Q. Oh, then you had not read his responses to the SS Form 150?

A. No.

Q. I see. Well, the record of minutes shows that at that

meeting, the meeting of January 9th (sic) the Board voted four to nothing that his classification – that his classification should not be reopened, did you not at that time?

A. Yes.

Q. Well, how could you vote if you hadn't read his file?

A. I read his file at that day and I reviewed the case with the other members of the Board.

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REDIRECT EXAMINATION BY MR. SEDLER

Q. Let me ask you an additional question; you have stated that you had no personal feelings against Mr. Mulloy?

A. Right.

Q. Did you have any feelings against Mr. Mulloy due to the fact that he had asked for classification as a Conscientious Objector?

A. No, no more than any of the rest of the registrants who had asked for that.

Q. You say other registrants have asked for it?

A. At times, at different times, yes.

Q. Do you recall the last time that a registrant asked for that classification?

A. No, no.

Q. You do not?

A. No.

Q. Do you recall in your tenure of service that the Board has given anyone a classification as a Conscientious Objector?

A. Yes.

Q. But you don't recall the name of that individual?

A. No.

Q. And that – but this was done and this person was

ordered to perform civilian work?

A. Yes.

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MR. J. ALLEN SHERMAN, called as a witness, by the defendant, having been first duly sworn, was examined and testified as follows, to-wit:

DIRECT EXAMINATION BY MR. SEDLER

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Q. You have been on the Board since 1948?

A. Approximately.

Q. During that time – strike that.

Let me ask you this; what is your understanding of a conscientious objector?

A. My understanding of a conscientious objector – it's pretty much spelled out in the regulations, I believe, and my understanding of it would be one who has conscientious scruples against taking another person's life even under any circumstances.

Q. Does participation in war in any form –

A. (Interrupting) That's correct.

Q. Now, there is another classification is there not also, a class 1-A-0, opposed to the participation in combat, but will so perform noncombatant service?

MR. HUDDLESTON: Objection, this is inquiry into the law itself which is not a jury question.

BY THE COURT: Well, I will let Mr. Sherman answer it if he can.

THE WITNESS: Repeat the question, please.

Q. The question is, I mean is there also not a classification of 1-A-0 where the person is opposed to participation in combat, but is willing to perform noncombatant military service?

A. I'm not certain about that, whether there is a special classification or not. I don't mean – I know many of them do perform that sort of a service within the Army themselves. Now, whether this is a classification for it under Selective Service or whether that is designated by the Army, I wouldn't be certain about that.

Q. But Mr. Mulloy did not ask for that; he indicated he was opposed to participation in war in any form.

A. That's correct, as I recall it.

Q. When a registrant is classified as a Conscientious Objector, opposed to participation in war in any form, what happens? What disposition is made of that if you would have granted the classification to Mr. Mulloy that he sought?

A. As a Conscientious Objector?

Q. Yes.

A. He'd be classified as a 1-A-0 classification. He would be given an opportunity to serve in some institution of his choosing for a period of, I believe it is two years which he would have the choice of making an institution within a given group.

Q. You testified that you have read – you had read Mr. Mulloy's file prior to the meeting of November 9th?

A. I reviewed his file at that meeting.

Q. At that meeting; you had not considered it prior to the meeting?

A. Well, I am sure his file came up for consideration on other matters prior to that time.

Q. Not his claim for Conscientious Objector status?

A. No, sir; that came up at that time. We looked it over before he came in as we do anybody else.

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